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THE Public Interest

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The Law's Delay:
The Dragon Slain Friday Breathes Fire Again Monday
Macklin Fleming

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"Peace" — some thoughts on the 1960's and 1970's

DANIEL P. MOYNIHAN

A DECADE ago most of the social scientists with whom I work, and whom I have been associated with, were profoundly distressed about the directions which American society seemed to be taking. A pervasive, ominous sense of trouble shaping up could be encountered in what we wrote, and in our conversations. We thought things were going to become much worse than they were. We found ourselves saying this in the context of a society that didn't particularly understand, and didn't particularly welcome, such a proposition. That society—the America of the early 1960's—was much too optimistic about events, and almost in proportionate terms responded unhappily, angrily—nastily, if you will—to our glum prognoses, even as shortly thereafter it reacted in near panic when the troubles we had been anticipating came to pass.

It may be useful for those of us who went through that period of saying, "Things are going to be much worse than they are," now

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This is a slightly revised version of the Forty-First Alfred E. Stearns Lecture at Andover Academy, which was delivered by the author in January 1973. Dr. Theodore Sizer, whose name is mentioned in the text, is Headmaster of Andover Academy.

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to test our science—our weak and so uncertain science—by giving voice to our present presumptions, which, once again, we find at odds with established opinion. Our position has reversed itself—although, as will be seen, our roles remain rather the same. At this moment our presumption is: "Things are going to be much better than they are." Rather the contrary view obtains in circles once so optimistic—the faculties, let us say, of those prep schools and colleges which educate the children of the upper-middle class. I don't expect such circles to be any less annoyed with us this time than they were last, even if I am not any longer as interested in what they might think as perhaps I once was. But I am worried that my friends and I may have become overconfident in the aftermath of having seen ourselves proven substantially right about a fairly serious sequence of events, so that we could fall into a lazy oppositional habit of letting our own thought be shaped by reference to the thought of others.

This may be too indirect a way of putting a simple point. In the course of the 1960's we became a little contemptuous of those who had been so contemptuous of us. They had been so certain everything was bully. Then they became equally certain that everything was catastrophic. We have reacted to this by taking perhaps too much pleasure in remembering how wrong they were once, and just assuming that they are wrong again. It could be that our present position is no more than reactive. It should be tested, as should we.

We assert that things are going to be better. They are going to be different in any event, and they are going to be different in ways that can be identified and quantified. We find ourselves, at this point, saying this not just to a skeptical elite, but also to a public now much accustomed to the thought that matters do not change for the better, but only for the worse. We are out of phase. And yet, if our science, as I say, has any validity, it is surely in this regard and in this function. I don't want to be pollyannish. I don't want to suggest that those matters of profound concern which have so much gripped our society—those public concerns which dominated the private lives of Americans in the last decade—need now concern us no longer. I mean nothing of the sort. And yet I think the situation will be different in ways that on the whole will be for the better.

The uniqueness of the 1960's

There are certain essential facts, of which the first is simply that the great military involvement of the United States in Asia is for the

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moment at an end. This was coming. The event was not sudden; it was not precisely defined; it had not the concision one had learned to expect from American history. And yet the ineluctability of it was clear enough, certainly, for me to say to Dr. Sizer when he called late last year to ask if I would give the Stearns Lecture at Andover, to say "Yes," and to say, "I will talk about Peace."

But I would like to talk, not just about peace abroad, not at all about that, but rather about peace at home, peace within the society in which we live, following a tumultuous and rending decade which leaves us less than whole, leaves us fundamentally changed in many ways, and yet also a decade in the aftermath of which we can see ourselves resuming the fairly well-defined directions of a democracy, and doing so as a fundamentally competent people.

I would like to offer you a general proposition. (Be careful when Harvard professors say such things to you, because their general propositions usually won't seem very general at all.) I'd like to state that most of the events that tore American society almost apart (or so it seemed in the 1960's) arose from conditions unique to the decade in which they occurred. They had not ever existed before. They will not ever exist again. They involve the interaction of demographic and political-cultural changes. We have more complex terms for this than perhaps need be, all derived from the Greek, and vaguely related to philosophic doctrines of the past. We use the term "synergistic"—the interaction of muscles, of chemicals, of philosophical doctrine, such that two events quite separate in their origin affect one another in such a way as to produce outcomes vastly different and greater than either could produce on its own.

The proposition I'm going to put to you is simple. It is sufficient, I hope, at least to start a discussion of just what did happen. I'm going to say to you that *the 1960's saw a profound demographic change occur in American society which was a one-time change, a growth in population vaster than any that had ever occurred before, or any that will ever occur again, with respect to a particular subgroup in the population—namely those persons from 14 to 24 years of age.* This sudden increase in population interacted in a synergistic sense with a whole series of other events which originate, if you will, in the world of ideas, as distinct from the physical world in which populations increase or decrease. In the best known example of the 1960's, people changed their minds about the requirements of justice and decent public policy concerning minority groups in American society, at just the moment when the size and location of those groups was dramatically changing. But this was not

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the only change. People changed their minds about this, they changed their minds about that, and they changed their minds at just the point when the physical conditions of life, the ecological facts of how many people are around and where they are, were also changing. These changes interacted in such a way as to produce extraordinary discontinuities with the period immediately preceding —and, I think, with the period that now follows.

The youth explosion

It started out with this fact of population. The people who cause most of the "trouble" in a society, as you probably know, are people 14 to 24. They are also the people who are most interesting, most attractive, prettiest (that's for sure), handsomest (some say), brightest, healthiest, liveliest. Your mind starts deteriorating at about 24, as I understand it. In any event, everybody knows you run fastest, dance longest, and, at least in my youth, drink the most in these years. Societies, no matter where they are, are mostly organized around the problem of how to get people from 14 to 24. At 14 you are still in most respects a dependent youth, in some respects a child. At 24 you are an adult. In between extraordinary turbulences take place. They are such that there was at one point, at the turn of the century, a semi-scientific quasi-Darwinian view of the whole life experience—propounded and solemnly taught for a couple of generations—that each individual is born a savage of some kind, and gradually goes through a life experience in which he evolves. At one point he's a Mede, then he's a Persian, then he's a Greek, and with any luck he ends up a citizen of the Commonwealth of Massachusetts. Whatever the merits of that argument, all agree that the transition is enormously difficult and has to be followed with great care and attention, because all kinds of turbulence occur in the process.

There is no denying, I think, that in a curious way the advanced industrial societies in which we live have found it most difficult to provide this passage for young people. Only in the last century or so, really, have we begun to perceive this fact of youth, an age in life which is neither that of infancy nor that of adulthood but the long period in between. And we have had extraordinary changes in the circumstances of youth during this century-and-a-half or so. This has been basically a phenomenon of technology.

Andover, if I may presume a knowledge that I don't entirely possess, was begun for the primary purpose of educating a very

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limited group of persons, the priests of the society. When Andover was begun I should think doctors were not thought a profession, or much of one; engineers were skilled craftsmen who certainly didn't go to college. There were a few persons who did mathematics and a few people who did chemistry, but by and large only ministers and, perhaps, lawyers got educated. Almost nobody else needed to be. The rest could learn what they had to know in the normal process of going to work very early in life.

We have now extended that period of learning because so much more has to be learned. Simultaneously, another fundamental event has occurred, probably the most important event of its kind associated with industrialism, almost not at all noticed, which is that the age of sexual maturity has been going down and down and down. In round numbers, the age of menarche was almost 18 years in the early part of the 19th century. In the course of industrialization, it has dropped to below 12.

This, obviously, is a result of industrialization. It is perhaps the single most important impact which technology has had on the human experience. Let me not pretend to greater knowledge than I have. I say it is obviously technology because I can't think what else it could be, and I don't believe scientists have any firm theories as yet. It *could* be sunspots. But my bet is that it is a combination of clean water and abundant food. In any event, we may soon reach the point where Freud's discovery of infantile sexuality will become obsolete. People will sexualize at three and stay that way.

Thus you have a situation of a constant dropping of the age of physical maturity and an extension of the age of social maturity. So you might become physically mature at 12 and not be thought socially mature until you have had two years of graduate school at MIT. And if, in between, young people become turbulent, one is not to be surprised. Now the question is: How many such persons have been going through this experience?

This is the basic datum of my argument. Between 1960 and 1970 the size of this sub-group of the American population grew by an absolutely unprecedented amount, *and it will never grow by such an amount again.*

A new social class

Let me give you the figures. If you go from 1890 to 1960, you find the size of this sub-group, 14 to 24 years of age, growing a little bit each succeeding decade: 10 per cent, eight per cent, sometimes

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not at all, but usually growing a little bit. In the whole of that 70 years, from 1890 to 1960, the total increase in the population of that age group, the total increase of the "cohort," as we say, was 12.5 million persons. Then, in the 1960's, it grew by 13.8 million persons, an increase of 52 per cent in one decade, five times the average rate of the preceding 70 years. *It grew by 13.8 million persons: it will grow by 600,000 in the 1970's: it will decline in the 1980's.* It's all over; it happened once; it will not ever happen again. After a 52 per cent increase in the 1960's, we shall see an 11 per cent increase in the 1970's, and we shall see an eight per cent *decline* in the 1980's.[1]

In terms of what we call the dependency ratios—that is, how many young people there are as against how many older people who look after the young people, pay their bills, and tell them how to behave—the ratio of persons 14 to 24 to persons 25 to 64 increased 39 per cent in the 1960's, after either an increase of zero or a decline in every decade from the 1880's on. What happened, as we look back? (But first, let me not stand here and *tell* you what happened. I only offer a view. You may not share the view. You certainly need not.) What happened—in this assertion, in this hypothesis—is that suddenly a new social class was created in the United States, so large in its number that it was fundamentally isolated from the rest of the society. It was isolated on campuses, it was isolated in slums, it was isolated in a way in the armed forces. It had not much contact with people younger than it, very little with people older. It was apart from the rest of society. During this period the number of males 16 to 19 increased by 44 per cent, but the number of such persons *who were employed* grew only by 11 per cent; the unemployment rates for teenagers went up enormously, as did all such signs of dislocation, of alienation, of a lack of connection. And not just for the poor, and not just for the well-to-do, but at every level of society, there emerged a sense that "we are alone and separate from them." A youth culture developed. Youth acquired its own music, its own forms of dress, its own grammar, all to a degree without precedent in the United States.

For some time we have had "teenagers" around, but never with this relative lack of contact with older and younger persons and with such relatively intensive contact and concentration within their own ranks. The result was an extraordinary change in behavior. The curious compounding of this basic demographic fact with a certain

[1] These data are the work of Professor Norman Ryder.

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number of ideas and attitudes created, as I say, a synergistic effect. Attitudes about drug use changed and interacted with a vast increase in the population given to experiment in such matters. Attitudes towards dependency on government support changed and interacted with a vast increase in the population most exposed to dependency. Attitudes about patriotism changed and interacted with a vast increase in the population for whom such attitudes are of more than hypothetical relevance—which is to say, the population which is asked, or told, to fight wars. To repeat, the youth population explosion interacted with quite independent developments to produce much larger consequences than would have been the case had either of these developments occurred in isolation.

Well, it's over. That time is past. We are going through a period now when we are going to have a profound change in almost all of our politics, almost all of our social relationships, because this period is behind us.

The coming changes in our institutions

We are likely, for example, to see a real change in the operation of institutions. State and local government went through absolute hell in the 1960's. Why is that? It is because it has traditionally been the job of state and local government to look after young people aged 14 to 24, to get them through high school and perhaps college; to see that they don't steal cars; if they have children, to provide maternity hospitals for them; to provide new housing; and so on, down a long list. The crush was just too much for state and local government. But now, suddenly, it's over. *In all of the 1970's we will not "need" a single additional school teacher, if we maintain our present ratio of teachers to pupils.* We have reached suddenly, and have now gone below, a "replacement" birth rate. I cannot but note that there are a number of young persons around the Graduate School of Education at Harvard who are finding it hard to get jobs these days, and are themselves noticing that, while they were out attending Zero Population Growth rallies in the late 1960's, the birth rate had already dropped to the point where we no longer "need" new school teachers. I can state even more ominously that in the 1980's we won't need any more professors. Think about that!

The great pressures on state and local government are now receding. Moreover, revenue sharing has begun; the President signed the bill just last year. And so the 1970's and 1980's are likely to be a time when it's not so bad to be mayor, and being governor might

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be positively pleasant—whereas the job of President is going to be hell, because all the commitments assumed in response to the crises of the 1960's have over-committed the finances of the national government. No matter who is President, he or she is going to spend much of his or her time during the next 10 years vetoing bills—bills passed by Congress in the confident expectation that they will be vetoed. And whereas for years we had a flow of attention and interest to the national government, simply because that was the only place large new resources seemed available, we might well see the emergence of a degree of discretionary capacity in state and local government finances, which means interest will flow back. It will be interesting to be mayor; it will be important who gets elected. I think a movement down from the concentration, the over-concentration, on national government is inevitable, overdue, and desirable.

Along with all this, we are going into a period of enormous personal prosperity. The "magic of compound interest" is working on us now. Our gross national product in constant dollars will go from about one trillion, 115 billion last year to about two trillion in 1980. Per capita income by 1980 should reach $6,500 per person. I am soon to leave the United States to become Ambassador to India, to a country where about 140 million people live on a per capita annual income of under $20. And at the rate at which those incomes are growing, it might reach $24 by 1980.

We are going to have a level of personal opportunity associated with that kind of expenditure. We've not known its like ever before. We are not going to have the difficult experience of just keeping up with our needs that we've had to go through. Yet it should also be clear that we are not ever likely quite to be the same, certainly not in our lifetime, in the aftermath of the extraordinary decline in the confidence in American institutions which accompanied the experience of the 1960's. We shall have peace, but it will in some respects be a peace of exhaustion, and it might also and paradoxically be a peace of surfeit.

All of the surveys made of American public opinion in the last five or six years have shown an astonishingly precipitous decline in confidence in our institutions. One of the curious things is the way people in different sectors of the economy and of the society have looked at the drop of *their* confidence in *other* sectors and have said, "Look, no one has any confidence in you"—but have never looked up to note, "Alas, no one has any confidence in us either." American higher education has had a grand time explaining that nobody trusts the President, nobody trusts the Congress, nobody trusts big busi-

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ness, nobody trusts big labor. The best poll taken on confidence in higher education showed that in 1966 about 61 per cent of the American people would express a great deal of confidence in higher education; last year it was down to 33 per cent. (Mind you, the American people have not taken leave of their senses: confidence in Congress was only 21 per cent, newspapers only 18 per cent, and advertising a mere 12 per cent.) We are none of us particularly proud of ourselves just now. We aren't particularly confident about our situation. And yet the basic ecology that ultimately shapes our sense of national well-being is once again moving in a good direction.

From youth to maturity

I think I would predict a more "conservative" society simply on the ground that a society whose population is barely growing tends to be curiously straitened and strict in its behavior. I make no claim to any "scientific" evidence on this point. I speak more from literary sources. If I had been asked, 10 years ago, whom to read to find out what America was like, or was going to be like, I would unhesitatingly have said, "Read Mark Twain." Mark Twain mostly tells the truth, as Huck Finn said in the opening lines of that book. He had a great sense of the ebullience, the prospects, the limitless energy and potential of this great and endless country. I don't think I would say read Mark Twain today. I think I would advise a young person to read Balzac. Find out what it's like to live in a society where, if you want to be a professor, you wait until the man who is professor dies. Then the 15 of you who want the job compete in various ways. One of you gets it. The rest hope for the best for their sons. And you won't have had many sons, you'll only have two, as it were. This doesn't mean you have a society sated with social conservatism. Ideological radicalism may even flourish. The French indeed have a phrase for it: "Think left, live right." I incline to think we're going to see a lot of both.

But we're *not* going to have one new institution of higher education opening every week—as we had all through the 1960's. One new president, one new provost, two new deans, five new department heads, every week, with all that such rapid expansion implied.

The population explosion of the 1960's is easily enough explained. It followed a period of 15 years of depression and war, in which the natural progenitive qualities of the society were not given their outlet. There was a sudden increase, but it has now begun to fall back and slow down. We are getting back to earth, as it were. We

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overdid a lot of things, but we didn't go entirely wrong, and in some respects we came out a stronger society. Fifteen years ago ours was a caste society with respect to race; it no longer is. Fifteen years ago ours was a society in which the hegemony of the male, the normal presumption of male dominance, male exclusiveness in social and political and economic affairs, was a given; it no longer is. Ours was a society, 15 years ago, which was almost impervious to the thought that it had many problems of its own; it was much too eager to see problems in other countries and other places and to seek to deal with them. President Kennedy in his great inaugural address 12 years ago made that grand statement which, in looking back, we find ourselves so extraordinarily ambivalent about. He said: "Let the word go out from this place and this time that we will pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to insure the survival and success of liberty." Well, that was not the theme of the most recent inaugural address. It was that we may or we may not pay a price or bear a burden. We are not so sure of ourselves as we were; we know the limits of our power; we have tested the limits of our will; we aren't going to take quite so many chances. And yet, that too is a sign of maturity. That too, in some respects, marks the movement from that period of 14 to 24 into that period beyond, in which the fact of limitation of power, of energy, of integrity even, is acknowledged and learned and lived with.

And so it will be different, and it will not in every respect be better. It will certainly in no respect be more exciting. But it will, I think, be more rewarding. I think we have come out of our time of troubles. I think the first place that realization will be encountered is already to be seen—it is in our institutions of education, in our elementary schools, perhaps, but most importantly in our secondary schools and in our universities. After a time of great anguish for all of us, no matter what our views, no matter what side of the arguments we are taking, I think we have come back now to a time of peace. If I may express hope for the future, but also in that respect predict a little bit, I think that increasingly our schools will become, in the title of Dean Sizer's brilliant, small, new book, *Places for Learning, Places for Joy*. Thank you.

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The law's delay: the dragon slain Friday breathes fire again Monday

MACKLIN FLEMING

FROM the days of Magna Carta, Shakespeare, and Dickens to those of Roscoe Pound, Arthur Vanderbilt, and Chief Justice Burger, a long-suffering public has vented its frustration and anger against the law's delay. Most of the time such fulmination is routinely shrugged off by the legal profession with the comfortable rationalization that the general public doesn't understand the ways of the law and the problems involved. But periodically, as today, the law's delay surfaces as a political problem that demands immediate action and solution. On such occasions there customarily materializes a resolute St. George in burnished armor, who, with sharpened sword and lance and with inspirational motto on shield and banner, launches, amid fanfare of trumpets, a campaign into the bog to track the dragon of delay to his lair. In due course, St. George returns, announces to the cheering villagers that the dragon has been slain, drawn, and quartered, and then claims the hand of the beautiful princess as his reward. Public attention turns to other matters, for the problem of the law's delay has been solved. Yet within a short time the dragon reappears in his familiar haunts, as formidably entrenched as ever, breathing fire and spitting defiance at his adversaries.

In dealing with an enemy of such longevity and tenacity, extreme

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wariness is called for. Prudence suggests that before planning another campaign against the dragon we reconnoiter the terrain and orient ourselves to those landmarks known as the Bog of Delay, the Precipice of Haste, and the Trail of Expedition.

By the Bog of Delay we mean court delay—the dilatoriness of court procedures for the resolution of controversies. But what's wrong with delay? Perhaps the law's a little slow, but if eventually it gets where it's going, what harm has been done? Such questions ignore the verity that time is an essential factor in all human affairs, a verity to which the resolution of controversies provides no exception. What use the serum that gets to Nome six months after the epidemic has broken out? What use the lawsuit to resolve 20 years from now the present blood feud and existing street warfare between the Montagues and the Capulets? The primary function of courts is to resolve individual cases and controversies. An undecided divorce case leaves the status of husband and wife in limbo —married, yet not married. An unresolved criminal prosecution leaves the defendant in limbo—neither guilty nor innocent—and leaves the accuser in the same position, a witness neither true nor false. When the law fails to resolve controversies it has failed its function. When it fails to resolve controversies within a reasonable time it has frustrated the purpose of its proceedings, as occurs when punishment lags so far behind crime that the connection between the two is lost.

Opposite the Bog of Delay we find the Precipice of Haste. What's wrong with haste? Why do courts shun haste like the plague? Here too, the primary reason lies in a general truth—what is done hastily is apt to be done poorly and may have to be done over again. In law as in other matters haste makes waste. But a second reason exists for avoiding haste, one peculiarly applicable to controversies —the need to give each party a fair hearing. A fair hearing requires that there be an impartial tribunal authorized to pass on the issues before it, notice to the parties of the issues pending in the tribunal, opportunity to prepare to meet those issues, opportunity to hear and present both evidence and argument, and notification of the tribunal's decision. Lack of a fair hearing amounts to denial of due process of law and renders the proceedings nugatory. Courts that fail to provide the elements of a fair hearing—in particular, an opportunity to prepare and an opportunity to be heard—soon acquire such unflattering descriptions as star chamber, kangeroo court, drumhead court, and inquisition. Most courts lean over backward to avoid anything that might tend to give the appearance

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of a denial of full opportunity to prepare and full opportunity to be heard.

Between the Bog of Delay and the Precipice of Haste runs the Trail of Expedition. By following this trail controversies can arrive at a resolution that avoids both delay and haste, one that provides both a prompt disposition and a fair hearing. Expedition requires that a controversy be resolved within an appropriate period of time; our first exploration of the trail must search out what these appropriate time periods are. Once more we start with a basic truth—to everything there is a time and a season, and particularly so for the settling of differences. Do we spend this evening at the theater or at the baseball game? An hour or two is the maximum time for the resolution of the question, for otherwise the evening is lost. This coming weekend do we go to the seashore or the mountains? A day or two is the appropriate time for the resolution of this controversy, and an indefinitely deferred solution will defeat the purpose of either choice. These same considerations apply to legal controversies, for here too an appropriate time for resolution inheres in the nature of the controversy, and delay beyond that time deprives the controversy of its purpose and meaning.

In legal controversy we find certain generally accepted time periods for the resolution of particular procedures. In California the trial of a felony should start within 60 days of the accusation, and the trial of a misdemeanor should start within 30 days. A traffic citation should be resolved within 10 to 15 days. A criminal appeal should be decided within five to seven months of the sentence.[1] For each procedure or proceeding it is feasible to construct a time schedule for resolution, and to a considerable extent this has already been done by legislatures, courts, and judicial rule-making bodies, which have established norms for the handling of particular types of legal business. Our first discovery, then, is that excellent timetables for the passage of controversies along the Trail of Expedition already exist.

If cases inherently require resolution within a certain time, if through past experience those time periods have been worked out and already put into law, why does the dragon of delay continue to maintain itself? Is it not feasible to make a few additions to court facilities, adopt a few new laws, and thereby solve the problem?

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[1] See Cal. Pen. Code, §§1050, 1382; The President's Commission on Law Enforcement and Administration of Justice, "Task Force Report: The Courts," 1967, pp. 84-88; Cal. Vehicle Code, §§40304, 40306, 40501; Cal. Rules of Court, Rules 30 to 37.

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Does anyone want delay?

In most discussion about court delay it is assumed that delay is something nobody wants, that delay happens only through incompetence, mismanagement, or neglect, that delay is abhorred by all sensible and rational persons. An analogy is drawn between the conduct of court litigation and an airline flight from New York to Los Angeles: The main problem is how passengers and crew can best collaborate with one another to bring about a safe, speedy, comfortable, and economical voyage. In actuality, however, the assumption of collaboration in adversary litigation is a myth. Let us consider those who have an interest in delay.

Litigants. In the overwhelming majority of controversies one party has something to gain from court action while the other party has something to lose. In this respect the motivation of the parties in litigation differs sharply from that in contract, where both parties normally collaborate with each other in the expectation that both will profit. In criminal litigation the prosecutor seeks to vindicate the law by convicting a defendant charged with crime, and in civil litigation the plaintiff seeks a money judgment, or possession of property, or a favorable change in status. Normally, the answering party expects nothing from the litigation. At best he resists the claim. At worst he suffers a loss of liberty, a loss of money, a loss of property, or a loss of status. Obviously, the party standing to lose from litigation has no necessary interest in expediting it, for his interest may be better served by inaction and delay that leaves him unconvicted of a crime, or in possession of money, property, or status. For him, the dismissal, abandonment, or expiration of the litigation may be as satisfactory an outcome as a favorable decision. It is thus a fact of adversary litigation that the interest of roughly 50 per cent of litigants is promoted by delay and may be ill-served by a timely resolution of the controversy.

If we return to our analogy between the conduct of litigation and an airline flight from New York to Los Angeles, we see that a more accurate comparison would be with a flight in which half the passengers want to fly to Los Angeles while the other half want to remain on the ground in New York or perhaps hijack the airplane to Cuba. In such circumstances the idea of genuine collaboration among the passengers is not only unrealistic but positively misleading, for the two groups have no common interest in the conduct and operation of the flight. The interest of roughly half the litigants in indefinite postponement of any resolution of the controversy creates a massive force constantly at work in favor of delay. Any proposed

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solution to the problem of delay that does not take this force into account is bound to fail.

Counsel. If roughly 50 per cent of all litigants are interested in delay, their counsel will ordinarily reflect that interest and tend to use dilatory tactics. But what about the other 50 per cent of counsel? Since they represent parties with something to gain from the litigation, are they not interested in an expeditious resolution of controversy? On the surface this premise is undoubtedly correct. Yet all too frequently counsel on both sides of a controversy conduct themselves in a manner guaranteed to bring about substantial delay. For counsel, in addition to representing their clients, have a professional interest of their own to advance, which, consciously or unconsciously, may motivate them to tolerate delay even when it is not in their clients' interest.

Toleration of delay may result from counsel's inadequate resistance to two temptations. The first of these is to make litigation more protracted and complicated than is necessary. Trial counsel tend to be paid on a case-to-case basis, and generally speaking, the longer and more complicated the case, the greater the justification for increased fees. Because of the temptation to equate self-interest with client interest, procedures in litigation often extend beyond anything warranted by the requirement of the case and become a form of make-work. In time, such make-work becomes encrusted in legal practice as a matter of rote, and a permanent force for delay has been created. Counsel's second professional temptation is to acquire more business than they can handle. The nightmare of the typical trial lawyer is that one day he will find himself with nothing to do and all cases disposed of. From this spectre comes his willingness to take on new business that he cannot currently handle and his unwillingness to relinquish old business to other counsel to secure its prompt disposition. Translated into industrial terms, counsel's financial health is served by a backlog—that is, cases in which he has been retained and that await his attention when he has disposed of current business. A lawyer with a large and increasing backlog is a happy lawyer; a lawyer with a dissolving backlog tends to be an unhappy lawyer.

What this phenomenon of backlog signifies for the courts is that cases must await a particular counsel's availability, even when delay does not serve the interest of the client. At times such delay baldly serves the exclusive interest of counsel, as when counsel postpones the trial of a case in order to accommodate the exigencies of his personal income-tax bracket. Counsel who represent litigants with

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something to gain tend to justify delay with the argument that cases must be given time to *ripen* in order to make sure their clients receive everything to which they are or may become entitled. I have never heard a litigant express a comparable sentiment.

Why judges contribute to delay

In addition to pressures for delay arising from the interest of litigants and from the professional interest of counsel, there are pressures for delay that originate from the trial bench itself. These pressures do not derive from any personal interest of the trial judge in the outcome, but are a product of prevailing and persistent attitudes within the legal profession that have conditioned the viewpoint of the individual judge.

The most conspicuous of these attitudes is an idealized conception of a litigant's right to a fair hearing. Under the full flowering of this concept it is considered unfair to force a litigant to trial until he has exhausted all conceivable possibilities of perfecting his case. Pretrial requests by counsel for delay are almost invariably couched in terms of the need to perfect the case in order to assure the litigant his right to a fair hearing. Additional time is demanded to further prepare, to further search for evidence, to further research law, to further present motions, to await some other event, or to await the availability of particular counsel. A denial of the request is considered presumptively unfair, since it is always possible that something new may turn up. In short order such a denial is equated with a denial of due process of law or a denial of the right to counsel. A judge who regularly denies such requests for delay soon discovers he has made many enemies and few friends. He may find his competency to sit as a judge in other cases regularly challenged. He may find his rulings summarily annulled by the special writ of a higher court or reversed in due course on appeal. He may find his conduct in denying further delay publicly characterized by a higher court by an epithet such as "monstrous."[2] Complaints about his conduct may be made to the legislature or other body charged with the supervision of the judge's good behavior. Worse still, if the judge holds an elective post his enemies may organize formidable opposition at the polls when the time comes for his reelection. It is speedily brought home to the trial judge that he can hardly ever go wrong in granting further delay, even on the thinnest excuse,

[2] *Weeks v. Roberts* (1968) 68 Cal.2d 802, 807.

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while he can place himself in serious difficulty by denying such a request. In due course the idea of a fair hearing tends to become identified in judicial thought with the length of time a case has been pending. Forgotten is the fact that a speedy trial is itself an element of due process of law.

A second judicial attitude productive of delay is the notion that a litigant is entitled to an unlimited challenge against every aspect of the operation of the judicial machinery itself. Temporarily, perhaps even permanently, the litigant can divert the trial of a cause from the resolution of its issues to an inquiry into the propriety of judicial procedures. Within the past 20 years the idea has gained currency that hearings on such challenges are automatically required as a matter of constitutional law, and appellate courts have become quick to act to compel such hearings. As a result, the pressure on trial judges to conduct extraneous proceedings proves almost irresistible, and a litigant can purchase infinite delay by initiating one or more collateral procedures directed against the operation of the judicial machinery.

A third factor working for delay is a heritage of 19th-century Jacksonian democracy—the attitude that the parties and their counsel control the progress of litigation, and that the judge's function is solely that of a referee who hands down specific rulings at the request of the parties. Under the Jacksonian conception, the office of judge was drastically downgraded from the position of authority it occupied under English and colonial law. A trial came to be visualized as a contest between two lions stalking and mauling one another in the arena while an elderly grey-haired mouse advised the spectators what points to look for in picking the winner. From this viewpoint, the progress of litigation became the exclusive responsibility of the parties and their counsel.

The consequence of these attitudes has been to inculcate the trial judge with the view that delay in litigation is a normal, even inevitable attribute of our legal system, mandated by the requirements of the Constitution. The holiness of the proceeding becomes directly proportional to the length of time of the church service. Delay comes to be viewed as a positive good, in that it carries assurance that due process has been observed. As a result, the trial judge's rulings may tend to encourage procrastination, and he may resist all moves designed to alleviate delay on the ground that such moves might subvert the fairness of the proceeding.

If we return once more to our analogy with the airline flight from New York to Los Angeles, we find the passengers quarreling in the

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cabin over time of takeoff and place of destination, and the captain playing gin rummy with the flight crew in the cockpit while awaiting his instructions from the strongest and most aggressive of the passengers.

Some examples of delay

A few specific examples of delay in operation will illuminate the problem. Consider the chronology of a routine, run-of-the-mill, criminal case, *People v. Esparza*, a case where defendant was caught red-handed in the act of committing a burglary on 7 December 1968.[3] The reader is invited to imagine himself a participant in the case, either as witness, counsel, or presiding judge, and in that capacity to follow each step in the chronology as though he were personally involved. Subsequent to Esparza's arrest on 7 December 1968 these proceedings occurred:

1968

30 December —Information filed charging sundry robberies, burglaries, rapes, kidnappings, and sexual offenses.

1969

6 January —Defendant arraigned and pleaded not guilty.

3 February —Information amended to charge prior offenses. Trial continued to 4 March.

4 February —Arraignment and plea continued to 10 February.

10 February —Arraignment and plea continued to 13 February.

13 February —Defendant arraigned and pleaded not guilty. Trial date remained 4 March.

28 February —On defendant's motion trial continued to 2 April.

2 April —On defendant's motion trial continued to 24 April.

24 April —On defendant's motion that his counsel was elsewhere engaged, trial continued to 1 May.

1 May —On defendant's motion trial continued to 9 May.

9 May —On defendant's motion that his counsel was elsewhere engaged, trial continued to 14 May.

14 May —On defendant's motion that counsel was elsewhere engaged, trial continued to 15 May.

15 May —On defendant's motion trial continued to 20 May.

20 May —Defendant pleaded guilty to three counts of the information. Probation and sentence set for 13 June.

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[3] *People v. Esparza* (1971) California 2d Crim. #18326.

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13 June —Mentally disordered sex offender proceedings initiated, and proceedings continued to 10 July.

10 July —Defendant's motion to withdraw guilty plea granted, and not guilty plea reinstated. Cause continued to 18 July for trial setting.

18 July —On motion of defendant, cause continued to 1 August for trial setting.

1 August —On motion of defendant, cause continued to 8 August for trial setting.

8 August —On motion of defendant, cause continued to 29 August.

29 August —Prosecution moves to vacate order reinstating defendant's guilty plea. On motion of defendant cause continued to 5 September.

5 September —By stipulation cause continued to 1 October.

1 October —Prosecution's motion to vacate order reinstating not guilty plea denied. Cause continued to 8 October for trial setting.

8 October —Trial set for 2 December.

13 November —Hearing on defendant's discovery motion; motion granted in part.

26 November —Defendant's motion to dismiss two kidnapping counts granted as to one. Trial date of 2 December vacated, and cause continued to 3 December for trial setting.

3 December —Cause set for trial on 21 January 1970.

1970

21 January —Defendant's motion to relieve deputy public defender is denied. Defendant's motion to suppress evidence continued to 22 January.

22 January —Cause continued to 23 January.

23 January —Hearing on motion to suppress evidence continued to 26 January.

26 January —Motion to suppress evidence granted in part. Hearing held on motion to dismiss lineup evidence. Later, motion is denied. Trial continued to 27 January.

27 January —Trial begun.

9 February —Jury returned verdicts of guilty.

4 March —Judgment and sentence.

In Esparza's prosecution 14 months elapsed from the filing of the

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accusation to the entry of judgment. California law contemplates that criminal causes should be brought to trial within two months.

No less than 12 continuances of the proceedings were granted at defendant's request. Yet California has a strong statutory policy against continuances in criminal causes. Penal Code section 1050 states: "No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. . . . No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require."

Consider another typical example of the dilatoriness of courts in determining criminal causes. In *People v. Rankins* defendant was arrested on 8 December 1968 in possession of 11 ounces of heroin and $40,000 in currency and was charged on 11 December 1968 with the crime of possession of heroin for sale.[4] In May 1970 he pleaded guilty to one count and was sentenced on 9 June 1970. In this case 18 months elapsed between the time of defendant's arrest and the entry of judgment by the trial court on a guilty plea. The sole issue was a routine question of the lawfulness of the search and seizure. The cause was continued 12 times at the request of the defendant and two more times at the request of codefendants.

The *Rankins* case followed an equally leisurely pace on appeal. Although the appeal was from a judgment in which no trial occurred, 12 months elapsed before the judgment was affirmed. This period of time was better than average. In 1969 median delays for the various divisions of the California Court of Appeal, Second District, between notice of a criminal appeal and the filing of an opinion amounted to 12 to 25 months. In 1970 similar median delays amounted to 14 to 17 months.[5]

In the light of California's statutory policy against continuances, the reader may wonder why continuances are granted so readily by trial judges. The answer is found in the readiness with which appellate courts reverse judgments of conviction for refusals to grant continuances. Final judgments of conviction have been reversed for a trial court's refusal on the day set for trial to grant a defendant a 60-day continuance so that defendant could represent himself; for refusal to grant an additional seven-week continuance to a defendant on trial who had already obtained a two-week continuance when his counsel suffered a heart attack; and for refusal on the

[4] *People v. Rankins* (1971) California 2d Crim. #18761.
[5] 1970 California Judicial Council Report, p. 86; 1971 California Judicial Council Report, p. 97.

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morning of trial to continue a pimping case because the accusation had been amended to change the names of two customers from Jim Prince and Jim McDonald to John Doe Williams and John Doe Bob.[6] A trial judge soon learns that his denial of a continuance may result in a reversal of the judgment.

The routine criminal case

We have briefly surveyed the principal features of the dragon's terrain. But court delay, like influenza, has multitudinous causes, variegated symptoms, a diverse course, and an unpredictable outcome. Diagnosis is complicated by wide variations in timeliness appropriate for different types of cases and by startling differences among courts in the disposition of comparable cases. As an example, in some courts today a personal injury litigant may obtain a civil jury trial at once; in others he may be required to wait as long as five years.[7] To avoid reportorial sprawl this discussion of remedies for delay centers on two types of cases—the routine criminal case and the extraordinary criminal case.

Delay in the disposition of the routine criminal case carries the highly visible disadvantages of perpetuating unresolved charges, allowing defendants accused of serious crimes freedom to commit other crimes, and eroding the deterrent effect of punishment on crime. Periodically, therefore, campaigns are launched to eliminate such delay, campaigns that usually follow a standardized pattern.

A customary first step in eliminating delay is to adopt legislation prohibiting and proscribing delay, legislation whose long-term impact is about as effective as legislation outlawing sin.[8] We have seen earlier the lack of regard paid to California legislation establishing a stringent policy against continuances in criminal causes. We also note that California's statutory policy that a felony accusation be brought to trial within 60 days is met in Los Angeles County in less than half the cases filed.[9] To digress briefly to the subject of appeals, California's state constitution requires that all appeals be decided

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[6] *People v. Maddox* (1967) 67 Cal.2d 647; *People v. Crovedi* (1966) 65 Cal.2d 199; *People v. Murphy* (1963) 59 Cal.2d 818.

[7] Institute of Judicial Administration, New York, "Calendar Status Study—1971. Personal Injury Jury Cases."

[8] An example of such legislation is found in Rule 2, Federal Rules of Criminal Procedure, which declares that the rules shall be construed "to secure . . . the elimination of unjustifiable expense and delay."

[9] Eldridge Adams, "The Feasibility of Measuring & Comparing Calendaring Effectiveness," Los Angeles, 1971, pp. 49, 81.

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within 90 days of the time of submission, and in the absence of such decision a judge is not entitled to receive his salary.[10] This provision has been rendered ineffectual by the devices of deferred submission and of resubmission. California's state constitution also contains a provision that no cause shall be reversed on appeal *except for a miscarriage of justice,* a provision speedily interpreted to mean *no reversal except for prejudicial error,* and still later interpreted to mean *no reversal provided the error is nonprejudicial beyond a reasonable doubt.*[11] Experience amply demonstrates that laws by themselves, when opposed to powerful interests, have no strength of their own to perform their office and are routinely circumvented.

A customary second step in the campaign against delay in the disposition of the routine criminal case is to create new procedures in the hope that they will make the conduct of criminal trials more expeditious. But usually all old procedures are retained, and the net result may be to increase court delay rather than reduce it. An example of this is found in California's attempt to cope with current search-and-seizure doctrine, which prohibits the use in a criminal trial of evidence obtained as a consequence of an unlawful search or seizure. A special procedure was established to litigate the validity of a particular search and seizure in advance of trial, one that also included pretrial resort to appellate courts.[12] In theory, the new procedure would shorten trials by securing an advance determination of the legality of a particular search and seizure. In practice, substantially all former procedures remain available to a defendant who cares to employ them, and the net consequence of the new procedure has been to increase the possibilities for delay.

A third step in the traditional campaign against delay in the routine criminal case has been to increase the manpower of the existing legal system. Historically, this has meant the creation of more judges. There are, of course, times and places where more judges are needed. But like the passage of hortatory legislation against delay, an increase in the number of judges does not by itself solve the problem of court delay. Senator Tydings has pointed out that in comparable periods during which the number of federal district judgeships increased by 25 per cent, the disposition of cases increased by only three per cent.[13]

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[10] Cal. Const., art. VI, §19.
[11] See Cal. Const., art. VI, §13; *People v. O'Bryan* (1913) 165 Cal. 55; *Chapman v. California* (1967) 386 U.S. 18.
[12] Cal. Pen. Code, §1538.5.
[13] See 54 Judicature, 109.

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Calendar control

If more laws, more procedures, and more judges cannot solve the problem of court delay, where must we look for the key to improvement? Like the pot of gold sought for at the end of the rainbow, the real treasure lies buried in our own backyard, and it consists of nothing more complicated than the effective use of the legal machinery we already possess. At this point it is helpful to recall that law, in essence, is compulsion, and that the effective exercise of legal compulsion takes the form of a judgment. A court trial is the means whereby we arrive at the end product of legal compulsion, the judgment. Yet under past and present traditions the *means* of compulsion have been left largely under the control of counsel and litigants. In the routine criminal case, control over the progress of the case lies in the hands of prosecuting attorney and defense counsel, with the consequences we have discussed earlier. The first step in any effective campaign against court delay in the routine criminal case is to enable the judge, the one person in the courtroom who represents the general public interest, to regain control over the means of compulsion, i.e., the conduct of the case. This requires the judge to assume control over his calendar and himself determine the course of the trial. Effective calendar control in turn requires 1) judicial insistence on orderly progression of the case to trial; 2) time limits for the making, hearing, and determining of pretrial motions; 3) clear understanding that a procedure scheduled for a day certain will go forward on that day; and 4) acceptance of the date set for trial as immutable and sacrosanct.

In the routine criminal case, effective calendar control by the court means close adherence to standard timetables for the disposition of the type of case involved, abolition of continuances as a way of legal life, and, above all, commencement of the trial on the date set, which should be considered as fixed as an election date, a tax return date, or opening night at the opera. Such a program requires the judge to assume active control over the progress of each case pending in his court. (Each flight from New York to Los Angeles must follow the airline's timetable and the captain's flight plan and not those imposed by the most aggressive of the passengers on that particular flight.) The program also requires that if counsel is engaged elsewhere it is counsel's responsibility to secure a substitute, for the case will go forward at its appointed time. If all this sounds impossibly idealistic, evidence that it lies within reason and practicality is found in England, where the disposition of the routine criminal case closely conforms to this suggested pattern.

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The adoption of a program of control by the trial judge over the course of each routine criminal case requires both a sustained exercise of will by the judges themselves and a changed attitude toward trial court delay by counsel, by appellate courts, and by the general public. It also requires certain mechanisms to support and stimulate the trial judge, of which I will have more to say later. In time, the trial court judge behind in his calendar may come to be viewed in the same unflattering light as the city treasurer whose books are out of balance.

Lord Haw-Haw and Tokyo Rose

The extraordinary criminal case stands as a malarial swamp within the bog of the American legal system. Consider two comparable cases, one English, the other American. During World War II Lord Haw-Haw (William Joyce) and Tokyo Rose (Iva D'Aquino) made repeated radio propaganda broadcasts on behalf of Germany and Japan respectively. At the end of the war each was arrested and charged with treason. The defense in both cases was similar—at the time of the broadcasts the defendant did not owe allegiance to the prosecuting country. Both defendants were ultimately convicted. But their cases followed quite different chronologies.

1. Joyce was arrested in Austria on 28 May 1945, and in the following month he was flown back to England and charged with treason on 16 June 1945. Trial was set for July but was continued to September in order to allow defense counsel further time to prepare. Trial started in September 1945 and lasted about three days, at the conclusion of which the jury found Joyce guilty of treason. In October Joyce's appeal was heard by the Court of Criminal Appeal, and in November that court dismissed the appeal. On 18 December 1945 the House of Lords affirmed the decision of the Court of Criminal Appeal and dismissed the appeal. On 3 January 1946 Joyce was hanged.[14]

2. D'Aquino was arrested and interned in Japan on 17 October 1945, released in October 1946, and rearrested in Tokyo in August 1948. She was flown to San Francisco and indicted for treason on 8 October 1948. Her trial began on 6 July 1949 and lasted until 30 September 1949, when the jury found her guilty of treason. In October 1949 she was sentenced to 10 years in prison and fined

[14] See J. A. Cole, *Lord Haw-Haw & William Joyce*, 1964; *Rex v. Joyce* [1945], W.N. 220; 173 L.T. 377; *Joyce v. Director of Public Prosecutions* [1946] A.C. 347.

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$10,000. She began her sentence in November 1949, but in February 1950 she was granted bail pending appeal by Supreme Court Justice Douglas sitting as a circuit justice. The court of appeals heard her appeal in March 1951 and affirmed the judgment of conviction in October 1951. Her petition for rehearing in the court of appeals was denied in December 1951, her petition for certiorari to the United States Supreme Court was denied in April 1952, and her motion for leave to file a second petition for rehearing was denied on 6 April 1953.[15]

The disposition of Joyce's case from time of arrest to final judgment took less than seven months. The disposition of D'Aquino's case from time of arrest to final judgment took 90 months, a period roughly 13 times as long. If we compare time periods from initial accusations to final judgment the period for Joyce was six months while that for D'Aquino was 54 months, a period nine times as long.

This unflattering comparison of English and American dispositions of the extraordinary criminal case is not an isolated one. The longest criminal trial in English history, that of the Great Mail Train Robbery, lasted 48 days. The longest murder trial in England lasted 21 trial days. In contrast, the trial of the Manson group in Los Angeles took nine months. Selection of a jury to try an English criminal case normally takes only a few minutes. Selection of a jury to try Bobby Seale in Connecticut took five months.[16]

Special problems of the extraordinary criminal case

The inordinate delays that accompany the extraordinary criminal case are a product of the same forces that work for delay in the routine criminal case, i.e., pressures for delay from litigants and from counsel, and tolerance of delay by the trial judge. But additional forces are present. The defendant may acquire the support of a powerful special-interest group to advance his cause, as for example a trade association (American Book Publishers Council), a corporation (Westinghouse), a political party (Communist Party), a racial interest group (NAACP), a civil liberties group (ACLU), a patriotic group (American Legion), or a religious group (Seventh

[15] See *D'Aquino v. United States,* 180 Fed.2d 271 (1950); 192 Fed.2d 338 (1951); 203 Fed.2d 390 (1951); 343 U.S. 935 (1952); 345 U.S. 931 (1953).
[16] See Karlen, *Anglo-American Criminal Justice* (1967), p. 179; *People v. Manson* (1971) Los Angeles Superior Court, #A253156; *State v. Seale* (1971), Connecticut Superior Court, #15844.

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Day Adventists). A defendant who secures such backing may defer the day of final judgment almost to infinity.

In the extraordinary criminal case the receptiveness of the participants to exhaustive exploration of collateral issues is intensified. A defendant with no real defense naturally prefers to litigate side issues rather than stand trial on the merits, and it is always possible that a side issue may produce unexpected dividends. For example, in *United States v. Zirpolo,* male defendants charged in the New Jersey federal district court with violations of the federal racketeering act filed some 40 motions attacking the validity of the proceedings. Eventually, their motions were denied, and the defendants were convicted. However, the judgment of conviction was reversed on appeal on a ground put forward in one of these motions—there had been an insufficient number of women on the grand jury panel from which the grand jury that indicted these defendants had been drawn. In this instance defendants succeeded in metamorphizing the principal issue from that of their innocence or guilt of racketeering to that of the number of women on the grand jury panel from which the grand jury that indicted them had been drawn.[17]

In the extraordinary criminal case the growing tendency of appellate courts to interfere with the progress of the trial before and during the trial is heightened. Although a generation ago appellate courts considered it poor practice to intervene in the trial process or to review rulings of the trial court in advance of final judgment, today appellate courts routinely review the most pedestrian rulings of the trial court while the trial is still pending. The result may be serial review by appellate or federal courts of the principal rulings of the trial court, during each of which the forward progress of the trial comes to a halt. The folly of such pre-judgment review was set out by Justice Frankfurter some 20 years ago in prescient language that has gone unheeded by his judicial colleagues:

> If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might

[17] *United States v. Zirpolo* (1971) 450 Fed.2d 424.

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be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts.[18]

An inevitable outcome of this proliferation of legal activity is the growth of an enormous record of the proceedings, which in turn further slows the progress of the extraordinary criminal case. If a mistrial occurs, the trial normally will not resume until the entire proceedings up to that time have been transcribed. If a convicted defendant takes an appeal, the proceedings come to a complete halt —perhaps for a year or more—until the record has been written up. At this point a defendant has an opportunity to tender new issues by questioning the accuracy of the official report of the trial. Counsel on appeal, buttressed by the existence of a gargantuan record, are well-positioned to solicit lengthy extensions of time within which to file their briefs. When the appeal is finally submitted to the appellate court the length of the record and its accompanying briefs may bring about substantial procrastination by the reviewing court itself.

A final factor that works for delay in the disposition of the extraordinary criminal case is the tendency of American courts to perpetually reexamine the case, on the theory that it is always possible that some mistake might have been made and only the courts can remedy and set to rights a legal mistake. This attitude produces a rich harvest of post-conviction hearings, orders for new trials, collateral reviews, federal court reviews of state court proceedings, and the like. Forgotten is the availability of executive clemency and the pardoning power to deal with the possibility of mistake.

The art of the trial judge

The concatenation of the factors cited above makes the problem of the extraordinary criminal case in America one that almost defies resolution. In what direction does improvement lie? As with the routine criminal case, the key to an orderly disposition of the extraordinary criminal case lies in the hands of the trial judge, provided he is allowed to exercise the authority necessary to control the course of the proceedings. In this type of case, control over the proceedings by counsel and litigants is apt to prove particularly disastrous, for the extraordinary criminal case generates such a quantity of publicity that both prosecutor and defense counsel are sorely tempted to employ the proceedings to make their personal reputa-

[18] *Stefanelli v. Minard* (1951) 342 U.S. 117, 123-124.

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tions. Litigants—and witnesses too—often trade on their notoriety in the extraordinary criminal case to make money for themselves or their lawyers or to promote some particular cause of their own. If the trial judge cannot exercise firm control over the proceedings, matters rapidly get out of hand. Once that happens, the unfortunate trial judge is faulted no matter what he does.

For the trial judge, maintaining control over the extraordinary criminal case is a peculiarly individual problem, as control over such a case involves more art than science. Yet there are certain general precepts the trial judge can follow. Matters are ordinarily best served by treating the extraordinary criminal case as though it were a routine criminal case and applying to it the rules and time schedules applicable to the routine case. The trial judge should keep in mind that quantity and length of proceedings are not synonymous with quality and fairness of proceedings, and that the fact that the case is extraordinary does not compel extraordinary periods of delay. The trial judge should also resist demands by the participants to explore side issues that have merely a tangential connection with the issues in the case. In short, the trial judge should play down the case.

But the trial judge alone, even one blessed with the wisdom of Solomon, the tact of Lord Chesterfield, and the energy of Lord Mansfield, cannot by himself change our present methods of disposition of the extraordinary criminal case. To maintain effective control over the proceedings the trial judge must receive the full support of the appellate courts in his resistance to maneuvers designed to promote delay. A first step in the orderly disposition of the extraordinary criminal case requires that appellate courts resume their former attitude of self-restraint when asked to override pretrial rulings of the trial court and to intervene in the conduct of the trial.

This brief survey of the extraordinary criminal case need not leave the reader wholly pessimistic about improvement, for legal fashions and methods of handling business can quickly change. It is fully practicable, even today, to bring about an expeditious disposition in the trial court of the extraordinary criminal case without sacrifice of due process. A case in point is that of Arthur Bremer, who shot and wounded Governor George Wallace and three other persons on 15 May 1972 and was immediately apprehended. Bremer was brought to trial in a Maryland state court within two-and-one-half months of the shooting, and in a trial that lasted four days, he was convicted of assault with intent to murder over a principal

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defense of insanity. This trial disposition compares very favorably with the almost identical case that arose from the assassination of Senator Robert Kennedy and the wounding of five other persons on 5 June 1968 by Sirhan Sirhan, who was likewise immediately apprehended. Sirhan was not brought to trial in a California state court until seven months after the assassination, and in a trial that lasted 46 trial days he was convicted of murder and assault with intent to murder over a principal defense of insanity. Until February 1973 Sirhan's appeal remained pending in the appellate courts.[19]

The mobilization of countervailing forces

We have identified the trial judge as the key officer in the war against delay. We have also discovered that powerful interests work for delay, and that a trial judge without the support of strong and continuous countervailing forces cannot achieve lasting results by himself. What countervailing forces exist to offset the pressures working for delay? The most visible, of course, is the litigant with something to gain. When properly advised and counseled, he can be a powerful force in opposition to excessive and protracted delay. But the average litigant is not sufficiently experienced in the legal process to know how to exert effective pressure to combat delay. The same can be said of jurors, witnesses, victims of crime, and other persons who suffer inconvenience or hardship from the law's delay.

The most powerful force for the generation of pressure against court delay is an aroused public opinion. Public discontent with court delay is a force capable of erupting into spectacular displays of smoke, fire, and lava, but when uncontrolled it too often either misses the real target or else smashes it to bits. Effective control of the force of public opinion requires permanent mechanisms capable of channeling sporadic and wildly fluctuating pressures on the trial judge into sustained and even pressure that can bring about permanent improvement. Human nature being what it is, these mechanisms must use both carrot and stick.

The most promising mechanisms for channeling public discontent with the judicial system into constructive pressures for improvement are a strengthened presiding judge, a court executive officer, and a judicial council with powers of direction, approval, and removal over judges.

[19] *People v. Sirhan* (1972) 7 Cal.3d 369; petition for certiorari denied by U.S. Supreme Court, 35 L Ed 2d 613 (1973).

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The officer most directly capable of maintaining sustained and even pressure on the trial judge is his colleague, the presiding judge of a multi-judge court. Unlike the legislature and unlike the appellate court, the presiding judge is permanently on the scene and in a position to know how best to remedy deficiencies in the operation of his own court. A first step in creating permanent mechanisms to combat delay is to give the presiding judge broad supervisory powers over the administration of the court and the administrative acts of his colleagues, as well as broad powers to assign cases and judicial business among judges in a manner calculated to make the best use of their individual energies and talents. A trial judge remains free to decide cases on their merits but he does not remain free to set his own hours of court, to follow his own time schedules, to ignore court policies, to pick and choose the cases he will hear, and to disregard legislation and rules of court governing the disposition of particular types of cases. In these matters he is controlled by the court acting through its presiding judge. Responsibility for court delay is thus centralized in the presiding judge.

But the presiding judge of a multi-judge court needs assistance, for by himself he cannot effectively supervise clerks, reporters, bailiffs, stenographers, probation officers, accountants, statisticians, jurors, counselors, commissioners, and referees, nor can he supervise the management of the courthouse, the preparation of the court budget, and the disbursement of court funds. Help for the presiding judge is beginning to arrive in the person of the court executive officer, a professionally trained expert in court management. The executive officer can act as the arm of the presiding judge in assuming direct supervision over the non-judicial employees of the court. To the extent that delay in the trial or appeal of cases is attributable to the delinquency of court clerks and court reporters in preparing records, startling improvements can be quickly achieved. An executive officer can also help alleviate delay attributable to the acts of the judges themselves. His statistics on the disposition and pendency of cases provide an impartial, quantitative evaluation of the performance of individual judges, one that can prove embarrassing to an indulgent or delinquent judge and spur him to do better.

The judicial council

An energetic presiding judge, assisted by a capable executive officer, can do wonders to combat court delay. But his powers over

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colleagues of his same rank are necessarily circumscribed. Moreover, the energetic presiding judge in a particular district may be promoted to another court and be succeeded by a do-nothing jurist, and the capable executive officer may be followed by a "don't-rock-the-boat" bureaucrat. More is needed. To maintain sustained, even pressure on the trial judiciary a permanent body is required, one whose jurisdiction extends throughout the judicial system, one equipped with powers of sustained governance over judges.

For state courts this means a statewide body. For federal courts it means a national body. Since judges know most about the operation of the judicial system, such a body will be primarily—perhaps exclusively—comprised of judges, headed by the chief justice of the jurisdiction, and assisted by a permanent staff. Such a judicial council would, on the positive (or "carrot") side, establish rules and procedures, compile statistics and reports, adopt policy lines for the system, review legislation relating to court operations, survey the adequacy of court facilities and salaries, and recommend increased facilities and salaries when needed. But more important, on the negative (or "stick") side, a judicial council would approve or disapprove the qualifications of proposed appointees to judicial office, and would possess the power to censure, suspend, and remove judges from office for disability or misbehavior. There is thus created a powerful mechanism, which, if skillfully used, can move judicial mountains. No judicial council is at present equipped with all these powers, but within the existing California legal system a great many of them are exercised among four separate bodies, the Judicial Council, the Commission on Judicial Appointments, the Commission on Judicial Qualifications, and the California Supreme Court.

* * *

Yet even in California the dragon of delay has by no means been slain. Salvation does not lie in mechanisms alone, for mechanisms without will and spirit produce nothing more permanent than faded sign boards flapping in the wind of the statute books as mementos of former campaigns that have floundered in the Bog of Delay. To paraphrase Arthur Vanderbilt, dragon hunting is no sport for the short-winded.

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The cost of housing

B. BRUCE-BRIGGS

The cost of housing construction has risen so much that people cannot afford as much housing as they formerly bought at lower income levels when construction costs were cheaper.

—Yale Brozen, in Barron's Weekly, *25 January 1971*

While the middle class may well be indifferent to the plight of the poor, it can no longer ignore the fact that they themselves are being priced out of the housing market.

Testifying before the house banking and currency committee in early 1970, HUD secretary George Romney stated that to afford the median-priced home then being offered for sale ($27,000) without unreasonably stretching its budget, a family needed an income of nearly $14,000. Yet fewer than one family in five had an income that high. It's a remarkable statistic and, despite modest decreases in financing costs since then, it is not much improved today.

The housing crisis is clearly spreading to the once comfortable middle class, and if land and construction costs continue to increase faster than personal incomes, the crisis will surely intensify. In these circumstances, it seems likely that housing inevitably will command a substantially greater share of our natural resources.

—Thomas L. Ashley, in City, *Summer 1972*

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THE two quotations above illustrate the widely held belief that more and more Americans are being priced out of the housing market. This belief is by no means limited to radical critics of the American economic system—Ashley is a ranking Democratic member of the House Banking Committee (the committee responsible for housing legislation), while Brozen has done work for the conservative American Enterprise Institute. The idea of housing becoming more dear is a commonplace in discussions of urban affairs. Happily, this notion is quite incorrect.

Of course, finding decent housing at a reasonable cost remains a major problem to poor Americans, particularly in big cities. And there are local areas where housing is getting more expensive, particularly in New York City.[1] However it is easy to show that *nationally* housing is not getting more expensive; but since the belief in "escalating housing costs" is so widespread (indeed, nearly universal), it is necessary to make the demonstration in detail, employing a lot of dull numbers.

To begin with, housing, like almost everything else, has become more expensive in current dollars because of inflation. But has housing become more dear relative to income? According to the U.S. Census Bureau it has not:

TABLE 1. *Income and the Value of Houses, 1960-1970*

	MEDIAN FAMILY INCOME	MEDIAN VALUE OF HOUSES
1960	$5,620	$11,900
1970	9,867	17,000
(Gain 1960-1970)	(75%)	(43%)

Perhaps it may be doubted if the ratio of median family income to the median value of homes properly represents the relationship of *all* families to *all* homes. Actually, the distribution of incomes around the median has been nearly constant during the last generation. One way to check this relationship is to compare the median new home cost with the distribution of income. The following table assumes the "two-to-one" rule common in the housing market—i.e., a family is able to afford a house worth twice its annual income. Thus, if the median home sells for $20,000, any family with an income above $10,000 "can afford it."

[1]It is unfortunate that the New York experience has so flavored the media's perception of housing issues. A city containing mostly rented, multi-family, rent-controlled housing built on limited land is hardly relevant to a nation of mostly single-family, owned, and uncontrolled housing built on nearly limitless land. Even the East Harlem tenements observed by Penn Central commuters are not typical of the prevailing "shanty-town" slums of most cities.

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TABLE 2. *The "Two-to-One" Rule*

	MEDIAN VALUE OF HOUSES	PER CENT OF FAMILIES WHO CAN AFFORD MEDIAN HOUSE
1960	$11,900	46
1970	17,000	54

But many people question the accuracy of the Census. No doubt many homeowners reported the purchase price rather than the market value of their houses. Fortunately, we have some more detailed statistics on housing costs published by the FHA. All these figures refer to *new* homes *sold* and indicate that new homes have been getting relatively cheaper:

TABLE 3. *New Homes Sold, 1963-1971*[1]

	MEDIAN PRICE FHA MORTGAGED HOUSES	MEDIAN PRICE ALL TYPES OF FINANCING	MEDIAN FAMILY INCOME	RATIO OF FHA MEDIAN TO MEDIAN INCOME	RATIO OF ALL HOMES MEDIAN TO MEDIUM INCOME
1963	$15,500	$18,000	$ 6,265	2.49	2.89
1965	16,500	20,000	6,957	2.31	2.87
1968	19,200	24,700	8,032	2.25	2.86
1969	19,300	25,600	9,433	2.05	2.74
1970	19,200	23,400	9,867	1.95	2.37
1971	19,800	25,200	10,285	1.93	2.45

[1] *Statistical Abstract of the United States*

One could argue that median family income is a poor indicator of real resources. Social Security and state and local income taxes have greatly increased in the 1960's and, despite tax cuts, inflation has pushed families into higher federal income tax brackets. Happily, in the *Monthly Labor Review* the Bureau of Labor Statistics publishes an indicator of weekly "spendable income for a non-supervisory worker with three dependents." "Spendable income" is not quite the same as "take-home" pay because it does not deduct local taxes, union dues, and medical insurance, but still it is a reasonable indicator of the disposable income of a blue-collar family.

TABLE 4. *"Spendable Income" and Housing Prices, 1960-1970*

	"SPENDABLE INCOME" WEEKLY	MEDIAN HOUSE PRICE
1960	$ 72.96	$11,900
1970	104.61	17,000
(Gain 1960-1970)	(43%)	(43%)

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Some breakdowns of housing costs

One often-mentioned cause of the alleged escalation of housing costs is that construction costs are "skyrocketing," particularly building trades wages. The indicators of residential construction costs shown in Table 5 would seem to give little support for this analysis:

TABLE 5. *Price and Cost Indices for Construction and Selected Components of Construction, 1971 (1967 Base)*[1]

Median Family Income	129[2]
All Consumer Prices	121
Price of New One-Family Houses Sold	123
Wholesale Prices of Construction Materials	119.5
Building Trades Union Wages	144
Boeckh Small Residential Structure Cost Index	133
Boeckh Apartments, Hotels & Office Buildings Cost Index	135

[1] *Statistical Abstract*
[2] Calculated from USBC, P-60; 85

Some wages and some materials have very high costs, but not all construction labor is highly paid, especially where it is ununionized.[2] Little public attention has been given to the improved productivity of on-site labor, the gradual improvement of management skills, and the steady shift from on-site labor to off-site pre-assembly of major components. Certainly, there is a lot of graft and featherbedding in the industry, but most construction workers are highly skilled and highly productive.

Another alleged villain in the "housing crisis" is the rapidly escalating cost of land, said to be caused largely by "exclusionary" zoning ordinances which "bar" poor people from the suburbs.

TABLE 6. *Site Value, 1960-1970*[1]

	FHA MORTGAGED NEW HOMES	FHA MORTGAGED USED HOMES
1960	$2,404	$2,285
1965	3,137	2,955
1970	4,477	3,469
(Gain 1960-1970)	(86%)	(52%)

[1] *Statistical Abstract*

Since median family income went up 75 per cent in the same decade, it might be argued that the higher gains for new home sites indicate that many people are being priced out. Actually, however,

[2] In 1970 the median income of all full-time male workers (including bosses) in the construction industry was $9,091, lower than all industry groups except agriculture, retail trade, and business services. *Monthly Labor Review*, December 1972, p. 19.

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the cost of land is a tiny part of total housing costs. For example, take the breakdown of monthly cost for a then typical $16,000 home (Table 7) published by the (Kaiser) Commission on Urban Housing in 1968. Merely halving the cost of land would reduce the total cost by one per cent, and would achieve some, but not proportionate, savings in land development costs.

TABLE 7. *Monthly Cost Breakdown for a $16,000 Home (1968)*

Land	$ 4	(2%)
Development	9	(5%)
Construction	29	(17%)
Interest	50	(29%)
Taxes	45	(26%)
Utilities	29	(17%)
Maintenance & Repair	8	(5%)
Total	$174	(100%)

When someone writes, "X per cent of the public cannot afford a house," and cites the cost of new homes to support his position, he is ignoring the fact that most families buy *used* homes. The readily available data for used homes are less complete than for new houses, but they show the same lack of increase in relative cost.

TABLE 8. *Existing Homes Sold, 1960-1970*[1]

	WITH FHA MORTGAGES		WITH VA MORTGAGES	
	SALES PRICE	RATIO TO MEDIAN FAMILY INCOME	SALES PRICE	RATIO TO MEDIAN FAMILY INCOME
1960	$13,227	2.36:1	$12,238	2.19:1
1965	15,114	2.18:1	16,371	2.35:1
1970	17,842	1.81:1	19,500	1.98:1

[1] *Statistical Abstract*

The gain in value of VA houses between 1960 and 1965 suggests that World War II and Korea vets were getting more prosperous and buying better homes. After 1965 younger "cold war" and Vietnam veterans began to obtain VA mortgages.

But what of the $27,000 house cited by Ashley above? That figure is the *asking* price of a new house—a price rarely paid. But even here the trend has been favorable, as is shown in Table 9.

Homeownership costs and trends

Another commonly available source of data is the consumer price indices (CPI) published by the Bureau of Labor Statistics. The

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TABLE 9. *Asking Prices of New Houses, 1965-1971*[1]

	MEDIAN INTENDED SALES PRICE, NEW HOUSES FOR SALE	RATIO TO MEDIAN FAMILY INCOME
1965	$21,300	3.06
1968	24,600	2.85
1969	27,000	2.86
1970	26,200	2.66
1971	25,900	2.52

[1] *Statistical Abstract*

"homeownership" price index rose 49 per cent during the period 1960-1970 compared with 43 per cent for "spendable income" and 75 per cent for median family income, so apparently while our middle family is better off, our "typical" blue-collar family fell back slightly. Yes, but more interesting things were happening in the cost of housing. Table 10 employs an artificial indicator derived by dividing spendable income by the price index for homeownership:

TABLE 10. *"Spendable Income" and CPI-Homeownership, 1955-1972*

	"SPENDABLE INCOME"	CONSUMER PRICE INDEX—HOMEOWNERSHIP	WAGE/HOMEOWNERSHIP RATIO
1955	$ 63.41	77.0	.82
1960	72.96	86.3	.84
1965	86.30	92.7	.93
1966	88.66	96.3	.92
1967	90.86	100.0	.91
1968	95.28	105.7	.90
1969	99.99	116.0	.86
1970	104.61	128.5	.81
1971	112.12	133.7	.84
1972	120.79	140.1	.86

Note that the relative position of the wage-earner improved steadily until 1965, then began to deteriorate until 1970, and has improved since. These changes are attributable not to the cost of a house but to fluctuations in other housing costs—mortgage interest rates, property taxes, insurance, and maintenance, which together make up well over half the cost of homeownership. The changes in these costs for the period 1960-1972 are presented in Table 11.

The big items are interest rates and property taxes, both of which rose sharply in the late 1960's. These increases can be blamed not on inadequacies of the housing market, but rather on governmental policy. The high interest rates were caused by the deficit spending of the Johnson Administration's "guns and butter" programs and the

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TABLE 11. *Consumer Price Indices (1967 Base)*

	MORTGAGE INTEREST RATES	PROPERTY TAXES	PROPERTY INSURANCE	MAINTENANCE AND REPAIRS
1960	95.3	N/A	76.9	84.6
1963	90.0	86.7	80.0	87.7
1965	89.7	91.5	89.8	91.3
1966	96.4	94.4	94.6	95.2
1967	100.0	100.0	100.0	100.0
1968	106.7	105.6	104.7	106.1
1969	120.0	111.9	109.3	115.0
1970	132.1	121.0	113.4	124.0
1971	120.4	131.1	119.9	133.7
1972	117.5	145.7	123.2	140.7
Gain 1960-1970	(39%)	(N/A)	(48%)	(47%)
Gain 1960-1965	(−6%)	(N/A)	(4%)	(8%)
Gain 1965-1970	(47%)	(32%)	(26%)	(36%)
Gain 1970-1972	(−11%)	(20%)	(9%)	(13%)

Nixon Administration's initially ineffectual attempts to deal with the consequent inflation. Increased property taxes are the result of swelling local government costs, prompted largely by the unionization of municipal employees, but with some encouragement to spend by "the Feds" through various "matching grant" programs.

The final answer to the argument that people are being "priced out of the housing market" is that the number and percentage of homeowners increased during the decade of the 1960's. According to the Census, 64.2 per cent of housing units (houses and apartments) were owner-occupied in 1970 versus 61.9 per cent in 1960.[3] The fact that this gain was trivial compared with the rapid growth in homeownership during the early postwar period may be attributable to the vast augmentation of newly-formed households as the postwar "baby boom" generation came of age, married, and settled down. Certainly this group does not appear to have been cramped for space—the percentage of married couples not living in their own household (mostly with his or her parents) dropped from 2.9 per cent to 1.4 per cent during the 1960's. Our national standard of housing has increased so much that we find it difficult to recall that once upon a time young couples had to postpone marriage until they could find a place to live. Another change taken for granted today is the near disappearance of rooming and boarding houses.

The situation of renters

Maybe this concentration on homeownership is misleading—what about the one third of the nation that rents? Generally, the renters

[3] Also worth noting is that non-white homeownership gained from 38 per cent to 42 per cent during the same period.

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are less prosperous than owners and, according to some lights, more deserving of public concern. Rental data are less complete than those for ownership, but show almost the same pattern, as can be seen from the Census data in Table 12:

TABLE 12. *Income and Rental Costs, 1960-1970*

	MEDIAN FAMILY INCOME	"SPENDABLE INCOME"	MEDIAN MONTHLY RENT
1960	$5,620	$ 72.96	$58
1970	9,867	104.61	90
Gain 1960-1970	(75%)	(44%)	(55%)

And using the crude rule that a family should be able to afford to rent a home for 20 per cent of its income, we arrive at the figures in Table 13:[4]

TABLE 13. *The 20 Per Cent Rule*

	MEDIAN YEARLY RENT	PER CENT OF FAMILIES WHO CAN AFFORD THE MEDIAN RENT
1960	$ 700	73.4
1970	1,180	75.6

And comparing "spendable income" with the consumer price index for rent, we come up with Table 14:

TABLE 14. *"Spendable Income" and CPI-Rent, 1950-1972*

	"SPENDABLE INCOME"	CONSUMER PRICE INDEX—RENT	RATIO OF WAGES TO RENT
1950	52.04	70.4	.74
1955	63.41	84.3	.75
1960	72.96	91.7	.79
1965	86.30	96.9	.89
1968	95.28	102.4	.93
1969	99.99	105.7	.94
1970	104.01	110.1	.95
1971	112.12	115.2	.97
1972	120.79	119.2	1.01

The cost of rent relative to wages has steadily dropped through the 1960's and into the early 1970's. And of course, today's rental housing, like owned housing, is on the average qualitatively better than it was in the past in terms of unit floor space, floor space and

[4]Of course, use of these (or any other) rules of thumb shows that housing remains too expensive, particularly for the poor. The amount of housing units available at low cost or rent falls far short of the number of low-income families. Much needs to be done, but there is no evidence that the situation is deteriorating.

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rooms per person, plumbing, and structural condition. Indeed, much of the worst housing is now being "thrown away"—i.e., abandoned.

The sources of misconception

All of these data may be wrong (the consumer price indices are suspicious), but it is striking that they all lead to the same conclusion—that American housing is *not* getting more expensive, except for the minority whose income is not keeping pace with national gains. The data cited above are available to anyone. Indeed, almost all of this information is published in the most widespread sources for social science information—the *Statistical Abstract of the United States* and the *Monthly Labor Review*. The few calculations I have made can be done by anyone who has mastered long division. Why then is it widely accepted that housing costs have been increasing during the past decade? On *this* question there are no readily available data, and I prefer not to speculate here on social, political, and ideological matters. Of course, we all tend to repeat what J.K. Galbraith calls "the conventional wisdom."

But perhaps more important is the rather narrow upper-middle-class perspective of most writers on urban affairs. At seminars and meetings I often ask the audience to estimate the median value of all rents in the Borough of Manhattan. The answers always range between $200 and $300 a month. According to the 1970 Census, Manhattan's median rent was $99—not far from the rents for the other boroughs of New York or for the rest of the nation. The upper-middle-class audience of our seminars and meetings only seeks space or knows people who occupy space in rather limited areas of the borough. Large areas of the city are *terra incognita* to this group on account of its class standards and racial biases. The upper-middle class has expanded rapidly in recent years and demand for its established residential areas has far outstripped supply. Swank inner-city areas (e.g., Manhattan's East Side), "bohemias" (e.g., Chicago's Old Town), and good inner suburbs (e.g., Boston's Brookline) are under heavy pressure. The availability of plenty of moderate-cost housing in lower-middle-class neighborhoods or "ticky-tacky" suburbs is irrelevant to the urban upper-middle classes. Happily, most other Americans are getting better housing at lower real cost than at any time in our history.

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The moral crisis of the black American

ORLANDO PATTERSON

BLACK Americans, like the members of all disadvantaged minority groups and classes, face a critical dilemma in their push toward full equality. At the root of this dilemma is a fundamental conflict between the moral basis of the goals toward which they strive and the means employed in attaining these goals.

This conflict between ends and means revolves, in turn, around the antithesis between the two basic types of moral systems: determinism and self-determinism or moral autonomy. The relative merits of these two ethical systems in themselves are a matter for moral philosophers and need not concern us here. From the viewpoint of existing social morality, however, it seems incontestable that modern American society has a moral basis that is essentially autonomous. The American creed, the American reality, and the American dream all assume a certain conception of human dignity in which every individual is, and ought to be, responsible for himself and for his own actions.

The notion of individual responsibility is a sociological fact of American life—that is, it is a part of the value and belief system of the society. What is more, it forms the very core of the society's

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system of values and, as such, of its entire social order. Industrial society as we presently know it simply could not exist without this core value.

It may be that both ethically and in purely rational social-psychological terms, this value has no logical foundation—that is, on academic ethical grounds, determinism may be the more rational ethical system; and sociologically, as well as psychologically, it may be objectively true that individuals and their actions are determined by their environment, as B. F. Skinner recently argued with such persuasive eloquence and authority. Skinner completely misses the mark, however, in his failure to recognize that whatever the objective truth, it does not alter one way or another the possibly nonrational, but nonetheless real fact that American society rests on the essential value of belief in the rightness of moral autonomy and individual responsibility.[1]

What is also true is the fact that the vast majority of black Americans share, or would like to share, this core value. When Blacks demand their "manhood," when they claim that they want to control their own destiny, to control and be responsible for themselves and their communities, they are, on the level of social values, echoing a deeply held American belief, even while they may, on the political level, be threatening the society that refuses to allow them to share it.

It is precisely in their implicit commitment to an autonomous morality that their dilemma lies; for like all disadvantaged groups seeking equality, the most strategically useful moral system is determinism. We have, then, the paradox of a group of people seeking for the preconditions of moral autonomy by appealing to the opposing ethic of determinism.

Is there any solution to this dilemma? Before we try to answer this question, let us examine more closely the nature of the dilemma in concrete terms. Black Americans, as moral creatures in a state of extreme social deprivation, must not only change their present posi-

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[1]Indeed, a realistic scientific determinism must, given the nature of human society, especially industrial society, assume an autonomous moral orientation on the part of individual members of such systems; otherwise one of the major inducements available to the determinist would have been lost. Scientific determinism, then, is not only consistent with, but requires moral autonomy. The organizers of a Skinnerian utopia would have to find some way of conditioning people to believe in the myth of the moral and "pseudo"-scientific rightness of autonomy. This would be so even if our utopian scientists were able to demonstrate, finally, that moral determinism is, in purely ethical terms, superior to moral autonomy. In view of the functional indispensability of autonomy, however, such a demonstration would always be purely academic.

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tion, but explain it—if not to others at least to themselves. Marx's eleventh thesis on Feuerbach makes good political sense, but it must be remembered that it was a chastisement of the philosopher, not the ordinary man, not even the grass-roots activist who must somehow understand his world in subjectively meaningful terms, and who must find other than purely intellectual ways of resolving glaring contradictions—especially moral ones—if he is to function effectively.

A world of failure

What is the world which black Americans must explain? In the simplest terms, they must explain failure. We won't say whose failure it is—that indeed is part of the solution to the dilemma—but whether it is their failure, or the failure of the American ruling class, or the failure of the system, the fact remains that "failure" is the word that best describes the state of black America. And because Blacks are the ones who live with this failure, they, more than anyone, must come to terms with it.

They must explain why it is that every other ethnic group, with one or two exceptions, has left them behind in almost every respect. They must explain their low income, their poor showing in the occupations, their dismal educational performance, and their powerlessness in shaping the political course of their nation. Within their own communities, they must explain the fragility of their mores and institutions, the inadequacies of their homes, the insecurity of their households, and, perhaps worst of all, the high rate of intra-group violence and homicide.

In response to this, a preliminary distinction may be made between responsibility for the past and for what exists, on the one hand, and responsibility for the future, on the other. Thus, the black American may argue that his past and his present predicaments are determined by the society whites created and forced upon him. What he is striving for is the responsibility for his future, which implies the removal of constraints on his power to act and to guide his own development. This distinction, however, merely offers a useful refinement of the problem—it is by no means a solution because, between the determined past and present on the one hand, and the autonomous future on the other, is a critical transition. It is this transition from one stage to the other which poses the dilemma, not the stages themselves. The move from one stage to the next involves a radical moral transformation which is quite independent

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causally of either stage. Before one arrives at the point where one's world can objectively be considered one's responsibility, one must somehow have attained a subjective responsibility for one's actions. Otherwise, one remains trapped in the dilemma of seeking for a morally autonomous utopia by a recourse to deterministic explanations and strategies.

A good part of the tragedy of this dilemma, of course, is the fact that black Americans have largely failed to grasp its existence, and hence prolong the problem by clinging to impossible deterministic strategies. Why have they failed to see their dilemma? Largely because of the apparent advantages of determinism and the illusion of attaining the impossible which a superficial conception of determinism offers.

First, determinism seems to offer the best advantage for exploiting both morally and politically the status of being a victim. The cry of the victim, especially one who has been as outrageously exploited as the New World Black, seems morally unassailable: "We have been wronged, by any standards, we have been wronged!" And of course the implication of this cry of anguish hardly needs to be spelled out: "The wrong done to us must be righted; our grievances must be redressed."

All of this is fair enough, until the critical question is asked: Redressed by whom? By the wrongdoer? By the wronged themselves? Or perhaps by some third party—humanity in general? God Almighty, perhaps?

Usually it is the wrongdoer to whom the plea, the charge, is made. (Whether we call it a plea or a charge is simply a matter of the victim's style—he may make his cry with cap in hand or he may holler; that is to say, he may be, eeny-meeny, a Booker T. Washington, or miny-mo, an Eldridge Cleaver.) And in truth, the victim can and does experience some "letting-go" by the use of this strategy. If the oppressor has a conscience, as he usually does (since any skilled ruling class ought, at least, to be able sooner or later to afford the luxury of a social conscience), he will respond with one or another form of palliatives. The problem, however, is this: What precisely is gained, or can be gained, by such responses? Are there not clear limitations to the susceptibility of the exploiter to the prick of his conscience? Furthermore, and more important, at what price does the victim reap such benefits? To these questions I shall return later; already, however, the limitations of this moral strategy should be obvious.

The second and apparently even more attractive advantage of

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determinism is the fact that it appears so easily to explain failure. For one thing, it explains moral failure, both past and present. The black American looking into the shallow grave of his New World past can find all too easy comfort for the wretched picture that confronts him in the simple fact that the constraints on his ancestors were too great, too overwhelming for them to have done anything more than they did. His ancestors were in no way responsible for what they were, for what they did, or for what they failed to do. If they played little conscious role in the society in which they lived, they were not to be blamed because they were given little scope to do so. If they seemed the passive object of history, a people in no way in command of their own destiny, they were not to be blamed since their environment—or in more personal, tangible terms, the white man—did not "let them go." In like manner, determinism easily explains present weaknesses and inadequacies. The failure to compete educationally and economically, the high unemployment rate, and the multitude of other problems can all comfortably be explained away as the result of white racism and all the other familiar social and economic determinants—determinants which the social sciences, now thoroughly committed to their post-evolutionist liberalism, completely support with all of the weight and all of the prestige of contemporary science.

The moral inadequacy of social science

What is more, determinism completely explains not only failure in the sense of failure to achieve (especially when compared with other, more successful minority groups), but also failure interpreted to mean an involvement with wrong, shameful, or humiliating acts. Thus, the unusually high crime rate among black adults, the high rate of juvenile delinquency, the high rate of marital instability and parental irresponsibility, and the unusually high rate of dependence on welfare among the group are explained with almost ridiculous ease by social determinism. Any budding, first-year undergraduate in the social sciences could give a hundred and one reasons why these rates should not only in all probability be as they are, but, by all the laws of the social universe, had to be as they are. So thorough has been the explanatory job done by modern social determinism that the major explanatory problem in the social sciences with regard to Blacks today is no longer why the group fails, but why the miracle of occasional individual successes persists among them. Indeed, the reluctance of social scientists to take on the latter problem, in continued preference for the former,

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which now approaches the level of explanatory overkill, is rather extraordinary.

For the black American who is perverse enough to be troubled by the apparent failures of his group, however, the simple answer is the determinist social philosophy and explanatory system. What common sense and a lurking, latent sense of dignity disturb, sociology and its allied disciplines can always settle.

But can they really? Does a course in "Race Relations" or "Modern American Society" really dispel all moral doubts, all insecurities? Can the most probing review by John H. Franklin or C. Vann Woodward settle all, or even the smallest areas of moral concern about the past? Can Franklin Frazier, Gunnar Myrdal, or Thomas Pettigrew provide the moral framework for an honest appraisal of black society and culture? Does the deep sense of unease about the veritable fraternal carnage on the streets of the black ghetto, where one in every 10 adult male deaths is a result of homicide at the hands of fellow blacks, in any way diminish after reading the elegant treatises of modern liberal criminologists? It does not. And here, in a nutshell, lies the fundamental problem of social determinism. Social scientists can explain the world but they cannot change it; nor, alas, can they alter those unknown sources of the human heart that form the wellspring of man's moral being—and that goes as much for Blacks as it does for Whites, for victims as well as victimizers.

What is more, there is a latent awareness of the moral inadequacies of social determinism among Blacks, reflected in the strident rejection of sociology by many modern black spokesmen and activists. There is a certain grim, pathetic irony in this rejection. To many social scientists, especially of the older generation, who have spent a lifetime, first fighting the prejudices of social Darwinism and cultural evolutionism with their implicit racism and explicit ethnocentrism, and later firmly establishing the social sciences in their liberal tradition, the present rejection of sociology by black intellectuals and students (in some areas such as Boston so intense that white researchers have recently been barred from ghetto areas) must seem an act of gross ingratitude. For many this rejection has been not only a bitter pill to swallow, but a source of the most profound confusion and embarrassment. Why? Why should a group suddenly turn against the very body of scientists and scholars who have worked hardest to support them intellectually, who among all professional groups can take some credit for the more important decisions that have aided the group in recent years—the Supreme Court decision

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of 1954 and the Civil Rights Act of 1965, to name only two? Why should a young black sociologist, trained by one of the most liberal and sophisticated white analysts of black life, gratuitously turn against him and his discipline, and take to the production of such flatulently entitled works as *The Death of White Sociology*?

The answer is painfully simple. The rejection has a moral basis, not a scientific one. A few black scholars have attempted to rationalize their rejection on scientific grounds by publishing counter-sociologies, but these productions are, as often as not, embarrassing affairs which not only fail academically but are, invariably, thinly disguised imitations of the very discipline they are attacking.

The real reason for the objection, whatever rationalizations black intellectuals may offer, is the fact that any group of people with a growing, if not yet manifest, sense of racial dignity and awareness who have been studied and defended as much as Blacks have been, had, of necessity, to reject these studies on purely ethical grounds. The reaction has been a moral "gut-response," so to speak, as yet unarticulated or fully realized. Shortly, I shall offer a preliminary rationale for the rightness of this reaction.

The major criticism of moral autonomy, indeed the only one worth mentioning, is the seemingly persuasive argument that it appears to blame the victim for the crimes committed against him. Moral autonomy actually does nothing of the sort. The truth of the matter is that autonomy, as an approach to the problem of Blacks, has no case to answer, since there has never been a genuinely autonomous treatise or explanation of the black experience. What tends to happen is that moral autonomy is confused with two types of social science analyses which, when carefully examined, turn out really to be special forms of determinism. The two types of determinism so confused may be called historical determinism and biologic determinism.

Varieties of determinism

The confusion of historical determinism with moral autonomy is best exemplified by the response to the work of Daniel Patrick Moynihan on the Negro family. This work and the controversy surrounding it are sufficiently well known not to require a summary here. From an ethical point of view, what distinguishes it, along with a growing body of similar works, from the more common type of determinism (i.e., structural determinism) is the level of causal generality and the location of causal emphasis employed in explain-

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ing the problem. Historical determinism emphasizes the group's internal mechanisms of adjustment over time in explaining its problems: These problems are seen to have their roots in the conditions of a former period (in Moynihan's case, the period of slavery) and to persist into the present as a result of the institutionalization of the original adjustive mechanisms. Present structural factors are not neglected, but are assigned a secondary causal role in which they function as structural reinforcements of the institutionalized mechanisms originally generating the problem.

Structural determinists, on the other hand, reverse this causal emphasis. Present social and economic conditions are seen as the major causes, and historico-cultural factors are assigned a secondary role. Clearly there is both a factual and a moral basis on which these two types of determinists can attack each other. The factual criticism concerns the correct causal emphasis, and its resolution is a matter for further research and scholarship. The moral criticism, however, especially that of structural determinists against their historical counterparts, often misses the mark.

The structural determinists are on target when they claim that the historicists assume a very conservative rate of change and, by implication, possibility of change. We have all heard of the weight of custom and how slowly culture changes. Thus, if the problem has its roots in such institutionalized encrustments, nothing much can be expected in the line of radical solutions for a very long time. I consider this an acceptable line of attack, although its truth is yet to be demonstrated.

Where structural determinists completely miss the mark is in their claim that historicists blame the victim, and their implication that historical determinism is a ruthless form of moral autonomy. There can be no doubt, however, that historicists such as Moynihan are really completely deterministic in their approach. Their works in no way blame the victim—as William Ryan so stridently claimed[2]—but the victim's past and culture, which are seen as the major determinants of the victim's present problem. There is nothing remotely autonomous about such an interpretation of the problem; indeed, historical determinism would seem to be more deterministic than its structural counterpart, since it is a fact beyond dispute that the present is easier to change than the past and its legacies, as the structural determinists themselves, in their other tack, are only too willing to admit.

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[2] William Ryan, *Blaming The Victim* (Vintage, 1971).

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The second kind of determinism often confused with moral autonomy is biologic determinism. This is the old-fashioned physical explanation of racial differences which has returned to vogue in the works of writers such as Arthur Jensen. Biologic determinism is, however, the most extreme form of determinism; no responsible biologic or genetic determinist blames the victim of poor biological endowment for his problems. The most casual reading of Jensen clearly indicates that the man has nothing but professional sympathy, almost pity, for his black subjects. In this respect, at least, he is very much a part of the courtly tradition of what has been called "genteel racism." Everyone knows that the decent Southern gentleman desires segregation for no other reason than the good of his black people.

The reason why the position of "genteel racists" has been confused with autonomy is the fact that in terms of their own racial group, they are invariably rugged individualists with strong autonomous tendencies. What holds among equals, however, clearly does not hold between "superiors" and "inferiors." A racist psychologist will consistently condemn a white student who has failed his exams for his moral turpitude and lack of responsibility, and, at the same time, precisely because he is a racist, excuse a black student—indeed, offer his deepest sympathies.[3]

It is most unfortunate that social determinists, in failing to recognize the necessary double standard of the biologic determinist, have confused his brand of determinism, which he reserves only for "inferior races," with his own personal and genuinely held autonomy, which he applies to his equals.

Autonomy, then, has acquired a bad name in the social sciences by being identified with certain types of determinism which the dominant liberal wing of determinism happens to condemn. The truth of the matter, as I have stated earlier, is that there has not been, to the best of my knowledge, a single work on the black experience ever written from a genuinely autonomous perspective. This is not, incidentally, to imply that such works are not possible.

Victims and victimizers

Before exploring the means by which the central moral dilemma

[3]Liberals, incidentally, do exactly the same thing but for entirely different and often less honest reasons. I think it is wrong to call a liberal "racist" for engaging in this kind of double dealing, but it is understandable that many black scholars, including myself, find the practice intensely annoying. The proper criticism of such liberals is that they're being unspeakably dishonest.

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of the black American can be resolved, let us finally clean the slate by indicating the main reasons why determinism is totally unacceptable as the ethical basis of black moral life. First of all, on closer scrutiny, the advantage to the victim which determinism seems to offer turns into a Pyrrhic moral victory. By its very nature, a deterministic framework accepts and accentuates the moral superiority of the victimizer. As long as one is in the position where one has to appeal to the moral sense and mercy of another person, one remains, almost by definition, his moral inferior. The victim's cry for help and mercy concedes the nobility of the oppressor: Why should the man who has enslaved and exploited you respond to your cry unless, far from being an immoral tyrant, he has more than a spark of magnanimity? Indeed, the greater the appeal or the demand for redress from the oppressor, the greater the implied concession of the moral superiority of the oppressor. For the latter has nothing to gain and everything to lose by releasing his constraints on the ability of those he has oppressed to compete with him equally.

There is something inherently demeaning about begging help from your offender. It gives the offender the moral status of a god. The victim who cries, "Help me! You have crippled me, now make me whole again," is simply contemptible. There is nothing ethnocentric about the contempt we feel for such a plea. The literature, legends, and myths of almost every known culture make this point in the inevitable motif of the defeated hero who spurns the victor's help, licks his wounds, restores himself through sheer force of will (and occasionally a little help from the gods—his *own* gods), and then, fully recovered, returns to meet his antagonist on equal terms.

There can be no moral equality where there is a dependency relationship among men; there will always be a dependency relationship where the victim strives for equality by vainly seeking the assistance of his victimizer. No oppressor can ever respect such a victim, whatever he may do for him, including the provision of complete economic equality. In situations like these we can expect sympathy, even magnanimity from men, but never—and it is unfair to expect otherwise—the genuine respect which one equal feels for another. If one is to plead for equality with one's fellow men from a superior, it is best that that superior be God.

My second criticism of determinism is the more familiar one: To constantly explain away one's failure as a product of one's environment, or worse, of another race's or class's doing, either directly or through the system it controls, is to reduce oneself to

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the level of an object, and further to prolong one's dependency on that other group or environment. On the objectifying consequences of determinism, I think Sidney Hook has said the last word:

> Sickness, accident, and incapacity aside, one feels lessened as a human being if one's actions are always excused or explained away on the ground that, despite appearances, one is really not responsible for them. It means being treated like an object, an infant, or someone out of his mind. Our dignity as rational human beings sometimes leads us to protest when a zealous friend seeks to extenuate our conduct on the ground that we were not responsible (we didn't know or intend what we were doing, etc.), that we really *are* responsible, and that we are prepared to take the consequences of our responsibility. As bad as the priggishness of the self-righteous is the whine of the self-pitying.[4]

But even worse than the tendency to reduce the oppressed to the level of moral objects is the fact that determinism perpetuates the dependence of the victim in ways other than those indicated in my first criticism above. Since one's failure is entirely the consequence of another group, or of a set of circumstances created by another group, then it follows that only that group can change one's conditions. The oppressed become totally the product and creature of the oppressor, and it is the latter who must first change himself and his world before any meaningful change can be expected among the oppressed. Morally, this is a pathetic position, but it is one which, astonishingly, has gained much favor among not only white and black militants but also quite a few black moderates. *Ebony* magazine, for example, ever since it featured a slick cover story entitled "The White Problem in America," has apparently convinced itself of the rightness of this position; ironically, it even considers its stand tough-minded and radical. Whatever the immediate political gains which are made possible by such a position, however, the fact remains that it is both morally contemptible and a thinly disguised recipe for gross complacency.

A two-edged sword

A third criticism of determinism, from the oppressed's point of view, is the fact that it is, logically, a vicious two-edged sword. If the high crime rate among Blacks and all the other problems of the group can be explained away in deterministic terms, then equally, the pronounced crimes of Whites against Blacks, both past and

[4] Sidney Hook, "Necessity, Indeterminism, and Sentimentalism," in Sidney Hook, ed., *Determinism and Freedom* (Collier, 1961), p. 189.

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present, can and must be explained in deterministic terms. Sauce for the goose is sauce for the gander.

And it is no use claiming that the crime of Whites is greater than that of Blacks against each other and against white victims. Quite apart from the fact that, beyond a certain point, fine distinctions between degrees of enormity of crime are morally frivolous, there is the undeniable objection that to excuse one's actions on deterministic grounds while condemning similar actions on the part of one's oppressor on morally autonomous grounds is both ethically unacceptable and, of itself, morally contemptible. It is unacceptable in the categorical sense that to accept a standard of judgment for oneself which is not applicable to others is morally irrational, since it is so patently unfair. And it is of itself morally reprehensible in that it is self-demeaning, since it attributes moral responsibility to one's oppressor while denying it to oneself, thereby accepting the oppressor's moral superiority. Indeed, the argument is exactly similar to that of the white racist of biologic determinist persuasion in employing different standards for each group.

Determinism, then, leads its black supporters into a trap from which there is no escape. To be consistent one must accept the fact that Whites too are products of their environment and, as such, their exploitation of you and their racism can be explained away and excused in much the same way that black criminality and failure can be explained away and excused. In rejecting consistency and opting for the cheap righteousness of retributive condemnation, one accepts one's moral inferiority. In the end, moral determinism demands of its black supporters that they live with either gross intellectual inconsistency or moral self-contempt.

Finally, and closely related to what we have just said, determinism logically undermines all attempts to seize the initiative in asserting pride in one's genuine achievements. We said earlier that what is good for one group must be good for the other; the same principle applies to different actions of the same person or group. What is sauce for the goose of black educational failure and high crime rates is sauce for the gander of jazz and other black artistic and cultural achievements. One cannot dismiss the undesirable aspects of black life on deterministic grounds and then proceed to exalt and take pride in the desirable areas of black culture on autonomous grounds. If black problems are the consequences of white oppression and society, for which blacks can claim no responsibility, then similarly black music and folklore, black humor and black athletic prowess are the products of white oppression and

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society, for which blacks can claim no responsibility and in which they can take no pride.

The leap of will

How does a black man move from the vicious grip of determinism into the personal dignity and freedom of a morally autonomous view of his world, and how does he do so without falling into the dilemma of using deterministic means? How, in short, can determinism be finally rejected and personal responsibility attained?

Two preconditions are necessary for the resolution of this dilemma. The first is that, for black America, this must be a lonely task; there can be no help from others, none whatever, not even from the kindest, most genuinely liberal hands. The problem is the black American's alone. Until he is convinced of his sole responsibility for it, to the point where he feels that he must solve it alone because he has brought it upon himself, there can be no hope of a solution. The second precondition for a solution of the problem is, of course, an awareness of its existence. It is a sad fact that many black Americans have not yet reached the level of social and group consciousness where they can identify this dilemma. The main reason for this is the fact that the primary basis of group solidarity is still the negation of the white experience. Anger and hatred of another group can initiate a movement; they can never sustain it. Indeed, to persist in such negative group identity for too long is to destroy all possibility of positive development and of moral progress. A final settlement, a cessation of hostilities, and a return to some kind of modus vivendi with the white outgroup is an essential prerequisite for the development of the group to the point of social consciousness where the next critical dilemma which awaits it—its moral dilemma—is recognized.

Assuming that these two preconditions are met, how is the problem resolved? Quite simply, through sheer force of will. Moral responsibility can be attained only by a forceful spiritual assumption; by a flight, a leap of will into its alien camp; by a mental and moral capturing which itself becomes the act of transformation, the "recruitment," as Kierkegaard would have said, of the end strived for.

Sooner or later, all peoples experience this transformation. It is through some kind of radical moral conversion that a people finally become fully aware of, and assume total responsibility for, themselves—for everything about themselves, including their past, how-

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ever racked with subjection; and their present, however constrained by circumstances; and their future, however bleak. It is the kind of transformation which must go beyond, if not against, reason—beyond the tempting rationalism of Skinnerian psychology; beyond the reasoned, well-meaning, though morally flawed determinism of the social sciences.

The paths to moral responsibility

By what medium can Blacks achieve the moral transformation of their group? How can total responsibility be assumed? There are three possibilities: assumption through declaration, which is the weakest path; assumption through brotherhood, which has very severe limitations; and assumption through rebellion.

The first mode of assuming personal and moral responsibility is simply by declaring that one has done so. This form of assumption is usually more delusory than real, although it is possible for a few to talk themselves into a state of responsibility. If one declares often enough that one is responsible, it is just possible that one might persuade oneself of the fact, and even better, persuade others who, because of their new expectations, reinforce or condition one's own response into a morally autonomous mode of being. Many Blacks have chosen precisely this path to moral transformation. It is reflected, for example, in the frequency with which Blacks insist on the fact that they are "proud" or that they are "free," in stark contradiction to the actual situation or to their own statements on other occasions. The liberal segment of the white community has played along with this declaratory strategy. There is hardly an article written these days about Blacks which does not describe members of the group as "proud" or "dignified."

The problem with the assumption of responsibility through declaration, of course, is the fact that the claim often lacks any substance, and surrounding it there is always a disquieting air of unreality and contradiction. The same black person who declares himself free and proud might be seen going to cash a welfare check; the same black intellectual who asserts his dignity and freedom might be heard shouting for precisely this freedom and dignity at a political rally. The assumption of responsibility by declaration is possible if the will is there; more often than not, however, it amounts to nothing more than sheer compensatory talk. It is certainly no way for an entire group of people to go about solving the problem—a few fortunate individuals with highly de-

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veloped powers of self-persuasion, perhaps, but not an entire group of people.

The second path to moral responsibility among Blacks has been the medium of brotherhood. Increased racial consciousness and solidarity have been the major achievement of black activism in recent years. Apart from its political and limited socio-economic gains, the moral consequences of this movement are worth considering, for solidarity carries with it, unmistakably, a measure of responsibility. This is the concern, the commitment to other members of one's group. To be sure, this commitment, this responsibility for others, is largely social, but it does possess a moral quality: "Am I my brother's keeper?" is, as everyone knows, an intensely moral question. And the commitment of Blacks to the view that they ought, at least in certain important respects, to be their brothers' keepers, is in part a moral commitment. Brotherhood implies loyalty, oneness, trust, care, and a sense of involvement with, and responsibility for, all other members of one's brotherhood. It implies that one holds oneself responsible for everything, both good and evil, possessed by the group. Brotherhood, especially when allied to affliction, "recruits" responsibility as well as hope.

However, it is important to note that brotherhood is only a medium of transformation into true moral responsibility; it is not that responsibility itself. For those members of the group who are thus transformed, the moral leap occurs when loyalty, care, commitment, and, above all, faith in the capacity of the group are so strong that all that has occurred in the past can be accepted and accounted for; that the present adjustment of the group to its world is seen as a product of the group's limitations and virtues; and that there is sufficient confidence in the group's capabilities to manipulate its environment in the struggle for the attainment of its own self-defined goals.

But alas, it often happens that brotherhood, far from acting as a catalyst for this transformation, has other, opposing consequences. It may, for example, lead to a form of involvement where one is not really responsible *for* one's group but merely responsible *to* it and *with* it, vis à vis other members. An exclusive concern with responsibility to and with other members of one's group often, unfortunately, signals the closure of all possibility of responsibility *for* one's group. What is absolutely essential about responsibility for one's group is an awareness of, and concern for, the existence of the group in a world made up of other groups. Responsibility *for* is, by its very nature, outward-looking, "other-directed," to use

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Riesman's suggestive term; whereas responsibility *to* and *with* are always inward-looking. The latter two types of responsibility close the shutters on the first, in that they necessarily predispose members toward either an unduly defensive position, or worse, an obsession with group glorification, group isolation, and in the final analysis, group irresponsibility. Either the group can do no wrong or, insofar as it does wrong or fails, its actions can be explained away as the consequences of some other group's actions.

Thus brotherhood of the inward-looking type takes account of other groups only to excuse and explain away failure; it reinforces determinism rather than liberates the group from it. It takes only a moment's reflection on the present racial scene in America to realize that, for the majority of Blacks, this is precisely the effect that brotherhood has had. Like declaration, then, brotherhood, whatever its social and political merits, is a limited medium of moral transformation; it works for a few people but is not an acceptable path for the great majority.

Rebellion through usurpation

The third medium of moral transformation is, quite simply, rebellion. There are two types of rebellion, which I shall call "private" and "public." Rebellion as I understand it is the activation of that part of one's being which instinctively resists indignity, which, in the noble phrase of Camus, "declares a limit" on dehumanization and objectification. To accept the possibility of rebellion, one must also accept, as a basic premise, the fact that man is at least instinctively predisposed towards the defense of his own worth and dignity; that to be human is to desire freedom and dignity, and that not to have these is to exist in an unnatural state. When a group of people is forced into the unnatural state of "unfreedom," it naturally resists, sometimes publicly, more often privately and inwardly.

There are several ways in which the oppressed man resists privately—through the medium of usurpation, through spiritual withdrawal, and through denial. Rebellion through usurpation is one of the most sublime forms of irony, for here what the oppressed does is to rebel by taking over the culture and life style of the oppressor. After all, what better role-model of an autonomous group is there than that of a ruling elite? And what better way to acquire an elite's sense of moral responsibility, its aristocratic belief that the world is manipulable, than simply to enculturate its style?

This may seem to many an outrageous proposition. Yet the fact

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remains that countless members of oppressed groups have chosen precisely this path to moral transformation. The assimilated Jew of pre-Hitler Germany and of modern Britain, the *assimilé* of the French colonies of Asia and Africa, the black Englishman of Africa and the Caribbean, and the often castigated "Afro-Saxons" of the United States are cases in point. But the technique is not the monopoly of oppressed minority groups; it is practiced as frequently by members of exploited classes, the classic case being the English Cockney who goes the well-trodden ascending route of Grammar School, Oxford, and the Labour aristocracy. Because of the racial factor, however, the technique of cultural usurpation has always been condemned by black activists and intellectuals, even those intellectuals who, without acknowledging it, have in fact used precisely this technique. A black man who enculturates the life style of the elite betrays, it is claimed, not only his class but his race. This criticism, however, has been grossly exaggerated. Certainly a risk of betrayal is always involved in employing the technique of usurpation, and certainly too, a great many black men who have chosen this path have fallen prey to these risks; but it is quite possible to use this technique without in any way betraying one's group. Indeed, as I have indicated in another article,[5] the experience can be a radicalizing one, and what is more, black history is replete with black cultural usurpers who have been strong defenders of and workers for their race.

What, after all, was W.E.B. DuBois but an Afro-Saxon? Can anyone intimately acquainted with his life and works doubt this? What was Frantz Fanon but an *assimilé*? Or to take an even earlier era of the black movement, what was Frederick Douglass but a cultural usurper? Yet all these men have made undeniable contributions to the progress of their group. It is only a crude form of racial nationalism, as totally obsessed with pigmentation as are white racists, which has completely clouded the issue. The usurper may sometimes be a political conservative or a traitor to his group politically, or he may be a revolutionary, but whatever the public political stand, on the private level the usurpation of the oppressor's culture and style is always an act of personal rebellion. It is the rejection of the vicious circle, of the irrevocable whine of deterministic justification, and a forceful acquisition, through individual cultural conquest, of dignity and the ethic of personal responsibility.

The main drawback of this technique, apart from the admitted

[5] "Toward a Future That Has No Past—Reflections on the Fate of Blacks in the Americas," *The Public Interest*, No. 27 (Spring 1972), pp. 25-62.

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socio-political risks of group betrayal, is the fact that it is enormously demanding both emotionally and intellectually. It is much easier to wage war, start riots, and throw bombs than to engage in this particular form of rebellion. For this reason it is and always has been most successfully pursued by the more intellectually oriented members of the oppressed group.

Spiritual withdrawal

The second type of personal rebellion is withdrawal—more particularly, spiritual withdrawal. Blacks have most extensively used this medium of moral transformation. It is a remarkable fact that, of the vast numbers of social analyses and commentaries on the black church, few, if any, have pointed out what is perhaps the central function of Christianity for its black adherents—the opportunity for the realization of personal responsibility which the Protestant version of the creed offers.

Fundamentalist Christianity, by placing the blame for sin and failure squarely on the individual, and by offering the hope of heaven through personal salvation for which the individual, and the individual alone, is responsible, presents Blacks with an autonomous oasis of dignity and personal worth in what is otherwise a desert of deterministic objectification. For the majority of lower-class, poorly educated Blacks, the Christian creed has been the only escape from the twin grip of racist biologic determinism and liberal environmental determinism.

But fundamentalist spiritual withdrawal, like cultural usurpation, has its dangers, although these are almost all social rather than moral. The dangers are well known—Marx's "opiate," religion, displaces aggression, channels group action in the direction of fantasy, and offers an outlet for the organizational and political skills of group leaders. This may all be true, but it is equally true that on the social level religion offered the only meaningful nationwide organizational base for Blacks at a time when such a base was desperately needed.

This is no place, however, to discuss the sociological merits and defects of the black church. My main reason for raising the issue is to indicate that the church's role is too often discussed in either purely sociological or purely theological terms. Both approaches, I think, have missed its major contribution to the black experience—namely, its role as a medium of moral transformation. It is the autonomous ethic of the black church which has kept the brakes on a

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complete moral objectification of the group. When a black militant seems to contradict his own avowed deterministic moral stand by suddenly declaring that he is in fact free or by resenting the moral patronage of someone who attempts too vigorously to explain and excuse him, this contradiction, this sudden, unwitting flash of a sense of moral responsibility is, as often as not, simply the upsurgence of a half-forgotten fundamentalist past.

In his church, the black man was every bit a rebel—not only in the style and content of his particular interpretation of Christian practices, but in his transformation from whining determinist to almost self-righteous autonomist. Every black church member in the course of his religious practices independently comes to the conclusion which Kierkegaard articulated over a century ago:

> *O, thou sufferer, whosoever thou art, if only thou wilt listen!* People generally think that it is the world, the environment, external relationships which stand in one's way, in the way of one's good fortune and peace and joy, and at bottom it is always man himself who is too closely attached to the world, to the environment, to circumstances, to external relationships so that he is not able to come to himself, come to rest, to have hope. He is constantly too much turned outward instead of being turned inward. Hence, everything he says is true only as an illusion of the senses.[6]

The limitations of black fundamentalism

Quite apart from its function as an opiate, there are two major disadvantages of black fundamentalist religion which limit its scope as a medium of moral transformation. First, the transformation wrought by this religion only marginally and sporadically permeates the secular life. In all religions, of course, there is a tension between the World and the Spirit, between the intrusion of the secular world into the sacred, and the sacred into the secular. Societies solve this problem through a variety of compromises—through the domination of the secular by the sacred, as in many Catholic and Moslem societies; through the domination of the sacred by the secular, as in several northwest European societies and traditional Chinese society; through a creative compromise in which there is a functional separation between the two on the social and political levels, but marked interpenetration on the cultural level, as in the Protestant ethic of 19th-century American society and in modern Judaism; or,

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[6] Soren Kierkegaard, *Joyful Notes in the Strife of Suffering: Christian Discourses* (Oxford, 1961), p. 114.

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finally, through an uncreative separation of the sacred and the secular. Black American society chose mainly the last kind of compromise. In spite of the strong social role of the church in the lives of black Americans, there has always been a marked distinction between what belongs to Caesar and what belongs to God, a distinction which is beautifully illustrated in James Baldwin's novel *Go Tell It on the Mountain*. The result has been that only a small proportion of black Americans have benefited in all areas of their lives from the moral transformation of their religious experience.[7]

It is interesting that many black religious leaders who have also assumed leadership in the secular life of their congregations have come to recognize the limitations of the black fundamentalist ethic as a medium of complete moral transformation. As a result, they have fallen back on the declaratory approach, attempting to blend the advantages of both strategies. A good example of a religious leader attempting such a combined approach to moral transformation is Jesse Jackson in the following recorded exchange at a religious meeting:

JESSE: I am
AUDIENCE: *I am*
JESSE: Somebody
AUDIENCE: *Somebody*
JESSE: I may be poor
AUDIENCE: *I may be poor*
JESSE: But I am
AUDIENCE: *But I am*
JESSE: Somebody
AUDIENCE: *Somebody*
JESSE: I may be uneducated
AUDIENCE: *I may be uneducated*
JESSE: But I am
AUDIENCE: *But I am*
JESSE: Somebody
AUDIENCE: *Somebody*
JESSE: I may be unskilled
AUDIENCE: *I may be unskilled*
JESSE: But I am
AUDIENCE: *But I am*

[7] This is in striking contrast to the Black Muslims of America who, unlike both their fundamentalist fellow Americans and the genuine Moslems of the Middle East, have created a religion with a strong ethic of spiritual rebellion—a "Protestant ethic"—which dominates their secular life and, as such, has created a tremendous moral transformation in all aspects of the lives of its members.

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JESSE: Somebody
AUDIENCE: *Somebody*
JESSE: I may be on dope
AUDIENCE: *I may be on dope*
JESSE: I may have lost hope
AUDIENCE: *I may have lost hope*
JESSE: But I am . . . somebody
AUDIENCE: *But I am . . . somebody*
JESSE: I am black . . . beautiful . . . proud . . . I must be respected . . . I must be protected
AUDIENCE: *I am black . . . beautiful . . . proud . . . I must be respected . . . I must be protected*
JESSE: I am God's child
AUDIENCE: *I am God's child*
JESSE: What time is it?
AUDIENCE: *What time is it?*
JESSE: Nation time
AUDIENCE: *Nation time*
JESSE: All right . . . look out . . .

It is doubtful, however, whether a combination of these two approaches in any way diminishes their disadvantages. In any event, a second problem with the use of religion as a medium of moral transformation is its seemingly imminent obsolescence. Blacks may still have one of the highest rates of church attendance among American ethnic groups, but it is a fact that the role of Christianity is declining rapidly among them, especially among the younger urban generation.

Existential rebellion

The third type of personal rebellion—denial—is the purest of all since it has no catalyst, no medium except its own occurrence. It is properly called "existential rebellion" because this is precisely the sort of thing which Camus, though he himself would have eschewed the term, discussed so eloquently in his great philosophical work *The Rebel.*

Camus' treatise was in nearly all respects an intensely moral work; yet in spite of a careful typology of rebellious types, it is surprising that he failed to explicate, as a variant of his pure-type existential rebel, the moral rebel. Throughout his work, Camus uses the rebel slave as a paradigm of the existential rebel; and in the same way that a slave who has conformed all his life suddenly says "no," for

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absolutely no other reason than the purely moral fact that sooner or later an inherent sense of dignity demands to be released, so it is that some members of modern black communities sometimes, out of the sheer need to exist in dignity and as human beings, forcefully transform themselves into morally responsible creatures. Rebellion, Camus suggests, performs the same role in the daily life of the existential rebel as the Cartesian "*cogito*" does in the realm of thought: "I rebel—therefore we exist." One may, at the risk of being pretentious, expand the above quotation as follows: "I rebel morally—therefore our humanity exists."

Whatever the philosophical foundations of this most extraordinary of moral transformations, it is a fact that many Blacks have experienced it. There is no other way in which the not inconsiderable number of successful Blacks can be explained. I remarked earlier that social science has engaged in explanatory overkill in analyzing black failure and that there are surprisingly few attempts at explaining black success. I suspect that few social scientists will take up the challenge, for there is no way in which the vast majority of these successes can be explained, either environmentally or genetically.[8] Yet the fact remains that there are numerous cases of black men and women, on the average no better endowed genetically than fellow Blacks they have left behind in the ghettos, and coming from environments with the same sorry list of broken homes, crime-plagued neighborhoods, drug-infested streets, inadequate schools, and racist white authority figures, who nonetheless succeed. How are we to explain them? We cannot. They defy explanation precisely because they alone account for their success; they made their success, and they made it, first, through a rebellion against their deterministic moral environment, and then, having gained their humanity, through the much easier rebellion against their social and economic environment.[9]

What is true of these black individuals is sometimes true of entire groups of people. There is no way, for example, in which an occurrence such as the creation of the state of Israel can be explained in deterministic or environmental terms. Indeed, a determinist of the late 1930's and early 1940's, after observing the objective facts of Jewish history and culture over the past two millennia with its tradi-

[8] Hence Christopher Jencks's now celebrated explanation of upward social mobility in terms of sheer "luck," in his *Inequality* (Basic Books, 1972).

[9] Nothing I have said, incidentally, should be taken to imply that their society should not, or could not, have done much more to have made their rebellion easier. Autonomy, as I hope to argue in a forthcoming article, is in no way inconsistent with political radicalism or even a socialist ideology.

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tion of the ghetto and the ghetto mentality, of political acquiescence, of a whole life style steepted in anachronistic ritual, compensatory attitudes and Talmudic ecapism, would have been forced to conclude that whatever the future held in store for European Jewry, a Jewish state was an impossibility. Yet it did occur, and, faced with the retroactive failure of any social science to explain it, we must employ some kind of moral explanation such as that offered by Alfred Jospe, who sees its creation as the product of a spirtual rebellion, identical to Camus' existential rebellion, which he calls by the Hebrew term "hutzpah" and defines as "a spirit of creative defiance." His elaboration on the concept of hutzpah comes as close as anything I have read to my own conception of the kind of moral transformation required in the black group. I shall therefore quote it in full:

> Hutzpah as I conceive it—is the rejection of peace between man and nature. It is the drive to touch, to build, to transform, to change the physical world as well as man's inner world. It is a spirit of rebellion that is unable to make its peace with that which is for the sake of that which ought to be. It is a spirit of defiance which refuses to acquiesce in the status quo and is ready to defy the forces of man, of nature, of history —yes, even of God—in order to reach out for something better, more complete, closer to the realization of hope and ideal.[10]

Clearly, existential rebellion has two critical elements, inextricably fused together. One is its negative quality, the refusal to accept the inner and outer status quo, the refusal to make peace with "that which is for the sake of that which ought to be." But, as Camus points out, this negation affirms something positive—what Jospe refers to as "the drive to touch, to build, to transform, to change the physical world as well as man's inner world." What is heartening about black Americans today is that, as a group, they have largely achieved the negative aspect of existential rebellion. There can be no doubt that the group now refuses to acquiesce in its present status. What is lacking, however, and is now badly needed is, first, an inward extension of this rebellion and, by means of this moral implosion, an achievement of the positive side of rebellion, the affirmation of true dignity in the unaided "drive to touch, to build." This only comes about when one accepts one's total responsibility for oneself and one's future. Present strategies, however, indicate that among black Americans there is still a reliance on the superficial

[10] Alfred Jospe, "The Threefold Rebellion: Some Reflections on Israel Today," in Alfred Jospe, ed., *Tradition and Contemporary Experience: Essays on Jewish Thought and Life* (Schocken, 1970), p. 293.

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advantages of determinism in going about the achievement of a change in their outer and inner worlds.

Rebels and criminals

One mistake which black Americans have made in this regard is to confuse the attainment of the positive dimension of existential rebellion with public or overt rebellion. Overt rebellion is the sort of rebellion people usually think of when the term is used. Its central tool is violence and its main objective is directly to destroy the source of one's oppression. The West Indian intellectual Frantz Fanon spent a lifetime examining the philosophical and political implications of overt rebellion, and I will not attempt a discussion of these aspects of the subject here, except to observe that I am in basic disagreement with his ideas concerning the psychological and moral consequences of violence.

I shall distinguish between two subtypes of overt rebellion: the pathological and the constructive. Pathological rebellion is a deviant form of existential rebellion exemplified by certain kinds of criminal acts. Much has been written recently about black political prisoners; most of it is sheer deterministic junk. It is important that one distinguish the criminal whose acts can be interpreted as acts of rebellion and the criminal whose acts are simply the results of depravity. The ordinary criminal who commits an act of violence against his victim dehumanizes not only his victim but himself. He is totally a creature of his environment and both he and his act of criminality are rightly explained away, like so many pillars of salt, by an environmentalist formula in a social scientist's textbook on criminology.

There is a sense, ironically, in which a certain tough-minded kind of autonomy can actually approve of determinism, if only as the basis of a disapproving moral judgment. That is, one can, as an autonomist, consistently take the view that a man gets the appraisal that he deserves. After all, as an explanation of objective social and psychological reality, determinism may well be correct (we have said earlier that this has no bearing on its moral significance). Thus, if a man behaves like a total creature of objective reality, like an object, it is only just that he be treated not only scientifically but morally as an object. The just desert of a man who denies his humanity in a criminal act of violence is to be treated in morally deterministic terms.

On the other hand, I strongly object to the ennoblement of base

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criminality by recent militant polemicists. This ennoblement, unfortunately, has been made easier by the fact that some black prisoners are indeed rebels, and it is they who give a core of truth to the manifestly spurious claim that all black prisoners are really rebels and political prisoners. Under what circumstances is a criminal act an act of pathological rebellion? When it is a last desperate attempt to affirm human worth rather than to deny it. Like the archetypal slave of Camus who "by protesting established the existence of the master against whom he rebelled," a certain kind of criminal does affirm both his own and his victim's humanity in attacking him. Far from objectifying his victim, he attempts—perversely, of course—to humanize him by drawing him into a desperate state of intimacy. To assault someone can, in a morbid way, be a terribly intimate sort of contact. The whole business is patently pathological and absurd, and is clearly a self-destructive way to go about restoring one's humanity; but in its desperation, its anguish, it does possess the stuff of tragedy. It deserves our genuine sympathy, which is why we judge it, unlike the ordinary criminal act, in morally autonomous terms; and this is why, in turn, we condemn both the crime and the criminal. Tragedies do not have happy endings, except in Hollywood scripts and in the make-believe ethics of sentimental liberal apologists.

The last thing the criminal rebel wants is to be let off the hook by being explained away deterministically. It is only in this way that we can explain the mysterious refusal of some criminals to cooperate with their defense lawyers. The criminal rebel commits his act not just as a desperate attempt to affirm both his own and his oppressor's humanity, not just as a pathological way of manipulating a world which conspires always to manipulate him, but also to experience chastisement and guilt, both of which imply direct personal responsibility.

Very few black criminals are rebels of this kind. It is possible, however, that the decline in recent years of the only form of public rebellion, namely urban riots, and the growing alienation and desperation of the urban lower classes, especially the unemployed youths, have led to an increase in the number of such pathological rebels. From what we have said earlier, however, it is clear that black intellectual commentary on the group's criminal class has missed the mark, both in its confusion of the genuine rebel with the mass of ordinary criminals, and in its deterministic interpretation and justification of the few who are genuinely rebels and who, above all, desire nothing more than to be condemned.

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The burden of complete responsibility

Finally, there is constructive public rebellion: the cohesive effort of a group, or a segment of it, to attain its goals by forcefully changing the world in which it lives. How does an oppressed group or class arrive at the point where it actually revolts? What happens at the precise moment preceding a rebellion? What, in short, are the precipitating factors causing a group of people to revolt? It is one of the weaknesses of almost all theories of revolution that they have never answered these questions or even attempted to do so. Marx, for example, offers us many sound ideas concerning the preconditions of revolt. He also tells us something about the anticipated utopian consequences of a certain kind of revolt. But there is nothing to be found in Marx concerning the factors immediately precipitating revolution—nothing, that is, except perhaps his early theories of alienation and immiseration, and these, frankly, are just not good enough. We have known far too many thoroughly alienated and miserable people who have failed to revolt against their oppression.

It is doubtful whether a specific theory of the precipitating causes of rebellion is ever possible, although, of course, a general theory of the structural causes of revolts is quite within the realm of sociological possibility. What I wish to point out here, however, is that whatever the specific causes of revolt, a *moral* revolution is either associated with these causes or is a prerequisite of them. Political revolt is, at best, a correlate of moral transformation; it is never the cause of such moral transformation. If there is any causal relationship, it is in the influence which a moral transformation can have on revolutionary action.

It may well be that the only way in which any meaningful change can take place among a substantial number of black Americans is through a total, almost revolutionary change in American society. Elsewhere I have indicated that this change, this revolution—which need not necessarily, perhaps cannot any longer, be violent—must be accomplished through a coalition of all those groups, now still in the stage where they subjectively define themselves as ethnic, who share a potentially common class interest in transforming American society. As the most oppressed of all these potential allies, it is only natural that black America should assume the initiative in bringing about this revolutionary coalition. It will never be able to do so, however, until it first, within itself, creates its own moral revolution.

As a prelude to this transformation, black America must recognize the moral dilemma it presently faces and, having recognized it, the group must both employ all the legitimate techniques available

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in escaping from the stranglehold of liberal and racist determinism, and, at the same time, make the great moral leap into total responsibility and dignity.

Let me, finally, emphasize the meaning and implications of this responsibility. To assume responsibility for oneself is to assume complete responsibility for one's past, one's present, and one's future. For the past, it means—to take the most extreme and painful example—assuming the burden of responsibility for even so horrible an experience as slavery—not its causes, not its explanation, but its responsibility. For the present, it means an acceptance of one's responsibility for all the failures—the poverty, the political impotence, the occupational lowliness—of the group. And for the future, it means that the group's destiny is its own, at least until that point at which it chooses to reject its ethnicity for the creation of a wider, more meaningful entity.

This is a heavy burden. To liberal determinists, too used to the idea of others bearing the burden of the black group, it may seem a pernicious suggestion. I have said many times before that freedom and dignity have their obligations. But if the weight of this assumption seems great, there are rewards. There is the fact that, in purely moral terms, each of the burdens of responsibility is negated by the genuine pride and dignity of denying another person or group the patronizing privilege of bearing it; and there is also the fact that in accepting the liability of carrying one's own moral burdens, one also gains the legitimate right to claim all that is satisfying in one's experience—the music, the art, the passion, the physical vitality, the zest for life, the relentless will to live, to survive. These are the gifts that lighten the burden of freedom, dignity, and total moral responsibility.

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The civil service: a meritless system?

E. S. SAVAS & SIGMUND G. GINSBURG

THE nation's basic civil service law was written in 1883, following the assassination of President Garfield by a disgruntled job seeker. The goal at the time was both noble and urgent: to assure that the merit principle, rather than the patronage principle, would be used for the selection and promotion of federal employees. Subsequently, in reaction to the excesses of the spoils system which had prevailed for the preceding half-century, a civil service reform movement swept the land, spreading through states, counties, cities, and school systems during the next few decades. Today, the so-called merit system—the name given to the elaborate web of civil service laws, rules, and regulations which embrace the merit principle—covers more than 95 per cent of all permanent federal (civilian) employees, all state and county employees paid by federal funds, most state employees, many county employees (particularly in the Northeastern states), most employees in more than three fourths of America's cities, and almost all full-time policemen and firemen.

However, vast changes in government and society have taken place in the last 50 years, and the rules and regulations appropriate for 1883 have now become rigid and regressive. After 90 years, the stage

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is set for a new era of civil service reform. Recent court decisions have ruled out several civil service examinations which had no demonstrable relation to the job to be performed; scholars and political leaders recognize the many shortcomings of today's civil service systems; and now the general public is stirring as well. The citizen sees that government—and tax collection—is a growth industry. (If we extrapolate the current rate of growth of the governmental work force, by the year 2049 every worker in America will be a government employee!) He sees that job security (tenure) exists for his "servants" but not for him. State and local governments spend as much as the federal government (excluding defense), and the citizen can see *their* work at close hand in his daily life. And what he sees is *not* a merit system—certainly not in the common usage of the word "merit." The low productivity of public employees and the malfunctioning of governmental bureaucracies are becoming apparent to an increasing number of frustrated and indignant taxpayers. The problem shows up all over the country in the form of uncivil servants going through pre-programmed motions while awaiting their pensions. Too often the result is mindless bureaucracies that appear to function for the convenience of their staffs rather than the public whom they are supposed to serve. It is the system itself, however, rather than the hapless politician who heads it or the minions toiling within it that is basically at fault.

Counterproductive policies

Imagine a large, multi-divisional organization with an annual budget of 10 billion dollars. Imagine further that the organization has the following personnel policies and practices:

- Most entry positions are filled on the basis of written examinations scored to two or three decimal places.
- There is no scientifically supportable evidence that these examinations are related to subsequent on-the-job performance.
- Once a ranked list of examination scores is established, management must choose one of the top three names on the list regardless of special qualifications, knowledge, experience, aptitude, or training of other applicants on the list.
- After an employee has spent six months on the job, he is virtually guaranteed the job for life, unless his supervisor files a special report urging that the employee be discharged or at least that the granting of tenure be deferred; it is very unusual for a supervisor to take such action.

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- An employee, after acquiring such tenure, can be fired only on grounds of dishonesty or incompetence of a truly gross nature, and cannot be shifted to a less demanding assignment.
- An employee is "milked" of his ability and dedication, while given little significant opportunity for advanced training, personal development, career counseling, mid-career job change, or an enriched job that fully engages his evolving interests; no manager cares about this situation.
- Promotions are generally limited to employees who occupy the next lower position within the same division; qualified employees in other divisions of the organization are discriminated against, as are applicants from outside the organization.
- Promotions are made primarily through written examinations, with no credit given for good performance.
- Salary increases are virtually automatic and, with rare exception, are completely unrelated to the employee's work performance.
- Supervisors belong to unions, sometimes to the same unions as the employees they supervise.
- All personnel practices are regulated by a three-man commission, whose powerful chairman is the Director of Personnel. Managers and supervisors must defer to his judgment on all personnel matters except those involving top-level executives.
- The employee unions have enough political power to influence the decision concerning whether or not the chief executive is permitted to stay on; furthermore, they also influence the appointment of top-level managers.

One does not have to be a management expert to be appalled at this array of counterproductive policies or to predict that the hypothetical organization employing such policies would be laughably ineffective.

Unfortunately, neither the policies nor the organization is hypothetical. The foregoing is an accurate description of the venerable civil service system under which New York City is forced to operate. In summary, the system prohibits good management, frustrates able employees, inhibits productivity, lacks the confidence of the city's taxpayers, and fails to respond to the needs of the citizens. While this bleak picture may not yet be fully representative of all civil service systems in the country, neither is it uncommon. Furthermore, considering that New York often serves as a leading indicator of societal problems, this pattern, if it has not already been reproduced elsewhere, may be soon—unless a groundswell of popular opinion leads to a new wave of reform.

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More than half of New York's 9.4-billion-dollar budget is spent on the salaries and fringe benefits of its employees. In the last decade, personnel costs have risen by roughly 150 per cent, while the number of employees has increased by about 75 per cent—to 400,000. (Genghis Khan conquered Asia with an army less than half this size; however, he used certain managerial techniques of reward and punishment which are mercifully denied to today's more circumscribed and more humane chief executive.) Of this number, about a quarter of a million (!) constitute the "competitive class" of civil service—that is, employees who are hired and promoted on the basis of competitive examinations. This is the aspect of the civil service system dealt with here.

In order to understand fully the shortcomings of the current system in New York, it is useful to look in turn at each of its major elements: the jobs themselves, recruitment practices, examinations, selection procedures, promotions, and motivational rewards.

Jobs, recruitment, and examinations

Jobs. Very narrow, specialized jobs have gradually emerged, in part because this makes it much easier to produce an examination specific enough to give an appearance of relevance and fairness. Credentialism runs rampant, and prerequisites are sometimes introduced with no discernable value except bureaucratic convenience in the subsequent selection process. As a result, artificial and nonsensical divisions have proliferated, and New York City now has Methods Analysts, Management Analysts, and Quantitative Analysts, as well as Office Appliance Operators, Photostat Operators, Audio-Visual Aid Technicians, Doorstop Maintainers, and Foremen of Thermostat Repairers. When the human cogs in the General Motors assembly line at Lordstown stopped working, it was a clear and obvious revolt against the dehumanizing nature of their activity. Could it be that the human cogs in the municipal machinery stopped functioning long ago, for the same reason, and we are just now indirectly noticing their sullen revolt?

Recruitment. The recruiting process for civil service jobs is similarly arbitrary. The law requires only that advertisements of openings appear in certain specified, obscure places and in formidable terminology: the formal descriptions, in "bureaucratese," of the narrow kinds of specialties mentioned above. The Personnel Department seldom goes far beyond this minimal legal requirement. This means that current employees (and their families) have an advan-

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tage over outsiders because they know where to look and how to decode the message. This fact, coupled with job qualifications of questionable value, serves to limit access into the service by other potential applicants.

In fact, this traditional process has been so ineffective that out of exasperation a competing recruiting organization was set up within the Mayor's office, not for dispensing patronage, but for recruiting the kind of professional and technical personnel without which modern government cannot really function. The most capable managers in the entire organization devote much of their effort and ingenuity to subverting and bypassing the regulations in order to hire such recruits from outside the system.

Examinations. About 400 civil service examinations are conducted each year in New York City, at great effort and expense, and about half of them consist primarily of written tests. *Yet not a single case could be found where the validity of a written test—with respect to predicting performance on the job—was ever proven.* That this problem transcends New York's borders is indicated by the following statement by the U.S. District Court in Massachusetts in regard to an examination for police officer:

> The categories of questions sound as though they had been drawn from "Alice in Wonderland." On their face the questions seem no better suited to testing ability to perform a policeman's job than would be crossword puzzles.

Heavy reliance on written examinations at least has the advantage of being "safe." No bureaucrat need be saddled with the difficult task of using his judgment somewhere in the selection process. Exclusive reliance on an "objective" test score creates a situation where no one can be accused of favoritism or overt bias, even though a test may demonstrate inherent discrimination against certain cultural minorities.

At present, candidates who pass an examination are ranked on an eligible list based on their adjusted final average, *carried to as many as three decimal places.* (Adjusted final average is derived from the candidate's scores on the individual tests which comprise an examination: written, practical, technical, oral, etc., plus veteran's preference credit, where applicable.) A manager must appoint one of the top three scorers. Now, no one seriously contends that a person who scores 92.463 on an examination of dubious validity is likely to perform better on the job than someone who scores 92.462, or even 91.462. This scientifically unsupportable custom is just another de-

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fense against accusations of bias and should be abandoned. Test scores should be rounded off, thereby creating more ties and giving managers more choice and flexibility in selecting their subordinates from among those candidates with the same score. The potential impact of this change, recently endorsed in New York City by Mayor Lindsay, can be indicated by noting that on the 1968 examination for Fire Lieutenant, 25 men scored between 86 and 87, and 203 scored between 81 and 82.

Another vexing problem with the existing system was described by one frustrated manager:

> The City's unimaginative recruitment mechanism, combined with generally unappetizing work surroundings, makes it virtually impossible to recruit stenographers at the entry level. Accordingly, we keep filling entry-level stenographer positions with candidates who make it through a relatively undemanding stenography test which has been watered down to qualify those with minimal skills. No attempt is ever made to differentiate between candidates on the basis of intelligence, work attitudes, motivation, reading comprehension. Thus, we start with an entry group whose competence has not really been tested—and may well be minimal—and proceed to lock ourselves in by demanding that all candidates for higher level positions be selected from this pool, even though the pool may be drained of some of its best talent over time.

An example of the straitjacket created by this rigid procedure can be found in the agency that needed a mechanical engineer for maintenance of heating, ventilating, and air-conditioning equipment. The experience of the six highest-ranking candidates on the "Mechanical Engineer List" was inappropriate, consisting of machine design, drafting, and the like; the seventh-ranked engineer, however, was ideally suited for the job. Nevertheless, the agency was constrained by civil service rules to hire one of the top three. Only by finally persuading four of the top six to waive their legal claims to the job, thereby elevating Number Seven to Number Three, was the agency able to hire the man with the needed experience. If any one of the four who reluctantly withdrew had joined the other two of the top six in refusing to do so, the agency would have faced the choice of hiring either no one or someone with an inappropriate background, even though a suitable candidate was available only a few meaningless points further down the list.

Selection procedures: an inverse merit system

The most surprising finding is that the current legally mandated selection procedure, ostensibly designed to hire the most meritorious

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applicants into city service, appears to be a failure according to that very criterion: *It discriminates against those applicants who are most qualified according to its own standards.* Candidates with low passing grades are actually *more* likely to be hired than those with high passing grades! Furthermore, this perverse result seems to hold true for all skill levels.

This finding emerged from a careful study of three representative (written) examinations, which span a broad gamut of entry-level skills: Railroad Porter, a position which requires minimal education; Clerk, a position which requires some educational attainment; and Professional Trainee, a job which requires a college degree. Each examination showed the same general pattern—roughly speaking, the *lower* the percentile ranking, the *greater* the number of hires drawn from that percentile group! Conversely, the *higher* the percentile, the *fewer* the number of people hired from it.

Corroborating evidence was found by analyzing a 10 per cent sample of those 1970 and 1971 examinations which resulted in actual hiring: In almost half of the examinations analyzed (14 of 30), none of the four highest scorers was appointed; in a third of the examinations no one was appointed from the top 10 per cent; and in two of the 30 examinations, no one was appointed from the upper half of the eligible candidates.

These anomalous and unexpected results are presumably due to the long delay between the closing date for applications and the date of the first appointment. Delays are produced by a combination of administrative procedures and applicant-initiated protests, appeals, and law suits. The sample of examinations revealed that in 1970, the median delay was *seven months* and the maximum (of the sample) was *15 months.* If we assume that the "best" people score highest, then it seems reasonable to assume that many will find jobs elsewhere and that as time goes on a decreasing number of them will still be available when "their number is called." Analysis of the data showed that the greater the delay, the deeper into the lists one had to dig to find people still willing to accept appointment. When the delay was "only" three months, the openings were filled from the top 15 per cent of the list, but when the delay was six months, hires were drawn from the top 37 per cent, and when the delay was 15 months (for the Clerk examination), it was necessary to dip all the way down to 63 per cent in order to fill the vacancies.

One could argue that this finding is true but irrelevant, and that the 6,000th person on the Clerk list, for example, is really not significantly worse than the fifth, both of whom were hired. But if this

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assertion is accepted, then one is essentially admitting that the entire examination process is virtually useless.

In summary, as far as drawing new recruits into public employment via examination is concerned, the evidence strongly suggests that *New York City's civil service system functions as an inverse merit system* (something the public at large has cynically assumed for years). Although additional verification is needed before this finding can be generalized, at the moment the burden of proof must fall on those who would maintain that New York's civil service really is a merit system in this respect. Indeed, to anyone familiar with both public and private personnel systems, it is quite obvious that large corporations today are much closer to a true merit system than are our governments.

Promotion and motivation

With regard to promotions, the civil service can be described more accurately as a seniority system than as a merit system. The rules discourage "lateral entry" into upper-level positions by outsiders. This means that one usually starts at the bottom and works his way up, which sounds fine: All organizations find it beneficial as a general practice to promote from within, and their current employees have a natural and desirable advantage over outsiders. In New York's civil service, however, this practice is carried to an extreme and becomes an exclusionary device that limits competition. One frustrated high-level city official offered a striking example of the problem:

> In an occupational area like computer operations, applying the usual rigid procedures denies us the option of hiring experienced computer programmers, systems analysts, and data processing managers. It would force us to appoint only computer programming trainees and to wait for these to be trained and developed by years of experience. This is patently absurd.

The current promotion procedure is as follows: Vacancies in positions above the lowest level in an agency are generally filled by promotion on the basis of competitive examination from among persons holding tenured positions in the next lower grade *in the same agency.* If the Civil Service Commission concludes that there are not enough people available at the lower grade to fill all the vacancies via promotion examination, it may decide to conduct an open-competitive examination as well. An open-competitive examination is open to individuals in other city agencies, to individuals in other grades within the same agency, and to complete "outsiders."

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But this openness is illusory. Assuming that the "outsider" has somehow ferreted out the fact that an open-competitive examination is being conducted, he is still at a significant disadvantage compared to the "insiders" who take the promotion examination. Any "insider" who passes the promotion examination will be offered the vacant position before it is offered to anyone who passes the open-competitive examination. Even if one accepted the validity of the examinations, one can seriously question whether it is always better for the public to promote an "insider" who scores 70 than to hire an "outsider" who scores 99.

A study was made of 10 pairs of written open-competitive and promotion examinations given for such positions as engineer, accountant, stenographer, planner, and so on. For each position the promotion and the open-competitive examinations were almost identical. Though the results are not conclusive, they are suggestive, to say the least: The lowest-ranked "insider" was selected over the highest-ranked "outsider" despite the fact that the latter scored higher than the former in all cases but one; "insiders" who averaged 14 points below "outsiders" were nevertheless chosen before the latter. One can legitimately ask how the public interest is served by this policy.

Damning though such findings may be, the worst feature of the promotion system is that an employee's chance of promotion bears no relation to his performance on the job. It is the promotion examination that counts and not performance, motivation, or special qualifications. Distressing examples of the unfairness that this system produces are legion. For instance, a man responsible for the successful completion of an important health program failed to pass the promotion test for Senior Public Health Sanitarian. To all who were familiar with his excellent work, this result was positive proof that the examination was completely invalid. At the top of the list on that examination was someone who has never been able to supervise people and has been mediocre on the job. The demonstrated inability of such tests to predict supervisory competence remains one of the major weaknesses of the examination system.

Given the nature of the promotion procedures, there are relatively few ways in which an agency head, manager, or supervisor can motivate, reward, or penalize his workers. Yearly salary increases are authorized under union contracts, while cost-of-living and comparability adjustments occur automatically for non-union employees. In principle, an outstanding employee can receive a special salary increase, but in fact the vast majority of employees are never really

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evaluated for such increases, as few agencies and few positions come under this policy. How long will a highly motivated and competent individual be willing to put forth extra effort when he receives no real reward compared with others who do much less? A sensible individual would conclude that instead of spending extra energy and effort on doing his job well, his time would be better spent studying for promotion examinations, or simply relaxing. Also demoralizing for supervisors is the knowledge that it is almost impossible to penalize or discharge the barely competent or even incompetent permanent employee. The administrative procedures involved, the time lags, the large amount of managerial effort needed "to make a case," all force the manager to live with the problem rather than to solve it.

Collective bargaining vs. civil service

The single most compelling reason for major reform of public personnel systems—even aside from the mounting evidence of their meritlessness—is the fact that a new system, collective bargaining, has grown up atop the old system, civil service. The enormous growth in membership, power, and militancy of unions of civil servants has resulted in increased protection, wages, and benefits for New York City employees—and in decreased productivity. The ultimate monopoly of power held by municipal unions raises fundamental and disquieting questions about public employee unionism that are not yet resolved.

It is an inescapable fact, however, that union power has produced a second personnel system overlapping and at times conflicting with and negating the civil service system. Job classifications and duties, recruitment, promotion paths, eligibility for advancement, and grievances all fall within the purview of the civil service system, yet all are in fact negotiated, albeit informally, with the municipal unions. Initial selection of employees had remained the one area under the exclusive regulatory authority of the Civil Service Commission, but this, too, is now becoming subject to joint policy determination with the unions.

A strong argument can therefore be made for acknowledging reality and abolishing the civil service system, relying instead on the collective bargaining system. In effect, this has already been done in one area, the municipal hospitals, which have been taken over by the independent Health and Hospitals Corporation. Its employees are no longer civil servants but continue to be represented by a union, and there has been no discernible harm to them or to the body politic. At

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the very least, a "Blue Ribbon Commission" should be appointed to consider long-term, fundamental reform of New York's civil service system, with particular focus on the overlap between collective bargaining and civil service.

What should be done?

In trying to prevent itself from doing the wrong things—nepotism, patronage, prejudice, favoritism, corruption—the civil service system has been warped and distorted to the point where it can do hardly anything at all. In an attempt to protect against past abuses, the "merit system" has been perverted and transformed into a closed and meritless seniority system. A true merit system must be constructed anew, one that provides the opportunity for any qualified citizen to gain access non-politically, to be recognized and rewarded for satisfactory performance, and even to be replaced for unsatisfactory service. The improvements that are needed are obvious:

- The principal determinant of promotions should be a performance appraisal and potential assessment system, based upon performance standards and established with union cooperation. Such a system should include an employee's right to review and appeal the appraisal report.
- An individual's salary increase should be a function of his performance. Salary Review Boards with union representation should be established in each agency to set annual guidelines for allocating salary increases in the agency out of a lump-sum annual budget for raises; for example, "standard" performers might get a five per cent raise, "superior" performers a larger one.
- Examinations should be for broad categories of related positions, with "selective certification" used to appoint specialists from within the pool of qualified candidates.
- Written examinations should be employed only where their validity can be demonstrated. Oral examinations should be used more extensively for both selection and promotion. (We are not referring to the kind of "oral examination" now sometimes given—namely, a stilted interview in which competent interviewers are asked to camouflage their reasonable but subjective impressions of the interviewees by asking the exact same questions in the same sequence and giving numerical ratings to the responses. These "oral examinations" are then graded by employees who conscientiously average the interview scores.)
- In selecting new employees, the emphasis should be on evalu-

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ation of qualifications, experience, assessment by prior employers, and an oral or practical examination.

- The custom of scoring examinations to several decimal places should be abandoned. Round off the test scores; this will create more ties and give the appointing authority more freedom to use his judgment.
- Positions should be evaluated regularly to weed out rampant credentialism.
- More upper-level positions should be filled at the discretion of management. A good model can be found in the New York Police Department, where the highest rank attainable by examination is captain, and the Commissioner has the authority to assign captains to higher ranks as long as he is satisfied with their performance.
- The system should stop discriminating against "outsiders." Open-competitive and promotion examination lists for a given title should be merged into a single ranked list; alternatively, "outstanding" outsiders should be selected before "good" insiders, and so on. Experience in New York City government should be one of the criteria used in evaluating individuals.
- A flexible system of probationary periods should be instituted, with the duration of the period bearing some logical relationship to the job. The granting of tenure should require a positive act, as it does in universities.
- To improve the performance and motivation of employees, training opportunities should be greatly increased. Job counseling and career planning should be introduced, and tuition-refund plans, evening courses, and released-time programs should all be utilized. Job responsibilities should be enlarged ("enriched") commensurate with employee acceptance. The constricted domain of the unfortunate doorstop maintainer might be expanded to include hinges and doorknobs, and in time even simple locks. So far Victor Gotbaum, the municipality's farsighted union leader, has done more for job training and enrichment than anyone on the management side.

The recommendations presented above would tend to make New York City's system more similar to the federal civil service. The federal system 1) makes far greater use of selective certification; 2) more readily accepts outside applicants for middle and upper positions, and evaluates them on the basis of their education and experience rather than by written examination; 3) bases promotions on performance rather than examination; 4) has a much shorter average time span for promotions; 5) identifies talented individuals early,

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at the time of the entrance examination; 6) encourages movement between government agencies; 7) is more concerned about training and identification of persons with higher potential; and 8) has a one-year probationary period for new appointees, with positive action by supervisors necessary for retention.

People who have served in both consider the federal system vastly superior to the one under which the city operates. However, some of the recommendations we have made would also apply to the federal government: 1) the need for evaluating duties and responsibilities of positions regularly to insure against demanding greater or different qualifications than the job requires; 2) strengthening the performance evaluation and potential assessment system; 3) doing away with automatic raises and tying them more closely to performance; and 4) making it easier to reward good performers and to demote or remove incompetent performers.

Racial and ethnic problems

The managerial virtues of such proposed changes are clear, but would they create an even worse problem of racial and ethnic patronage? In New York today, the civil service system is undergoing strain in part because of the widespread belief that to be successful in certain jobs one must possess traits that the system was designed to ignore: culture, class, neighborhood, and other such euphemisms for race and ethnicity. Hence the color-blind hiring practices which successfully staffed city agencies a half-century ago are not well suited for staffing the new municipal agencies that deal with problem families, drug addicts, and unemployed youths. Nor do they adequately provide the recruits needed by a police department whose job has changed significantly and now requires considerable community cooperation for effective crime control. Cultural rapport is vital for success in both the new agencies and old ones facing new challenges.

Ingenious job descriptions (with the adjective "community" frequently in the titles), public employment programs aimed at reducing unemployment in particular neighborhoods, and carefully targeted recruitment campaigns are being used to get around the color-blind system, but such policies have hardly gone unnoticed. Those groups that are already well represented within the civil service decry the "decline in standards," and attack such hiring programs in the courts and at the bargaining table. They may recognize the irrationality of the system, but they fear that civil service reform and greater managerial flexibility will be used to advance newcomers at their expense.

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Those major groups that are not yet proportionally represented, black and Spanish-speaking New Yorkers, recognize the irrationality of the system; they are successfully challenging discriminatory examinations which exclude them, and thereby introducing greater flexibility into the system. At the same time, though, they fear that a reformed civil service will allow supervisors the flexibility to discriminate against them.

We conclude that the civil service system is already enmeshed in all the strains of racial and ethnic politics in the grand New York tradition, and that a reformed system would be embroiled in similar, but hardly worse, fashion. This endemic condition, therefore, offers no grounds for abandoning the civil service changes advocated here, changes that are likely in time to provide improved delivery of public services to all citizens and neighborhoods.

The prospects for reform

How can civil service reform be brought about? At first glance, the picture is not very promising. Elected chief executives are understandably wary of the issue, on two counts. First, an attempt at reform might easily lead to demoralization of the work force, with employee resentment leading to a further drastic decline in government performance, to the chagrin of its head. Second, elected officials fear the voting power of the growing army of civil servants. In New York City, the conventional wisdom runs as follows: There are some 400,000 employees. Each one votes himself and influences several relatives and friends. Hence municipal employees represent a voting bloc of more than a million votes, more than enough to ensure victory or defeat. Therefore, the logic goes, don't do anything that might antagonize the work force—and be sure to treat it especially well in election years.

It is not at all clear, however, that this simplistic arithmetic really applies: At least one seventh of the work force lives out of town and is therefore ineligible to vote in New York's municipal elections; voter registration, turnout, and bloc voting may be no greater for civil servants than for other groups; many of those influenced by government employees are themselves in public service and should not be counted twice; and other friends who are not on the public payroll might resent the "good deal" that they attribute to the tenured civil servant, and hence would approve of reform.

Furthermore, candid discussions with many public employees reveal support for civil service reform; able and devoted civil servants—

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and there are many thousands of them—resent it when they see incompetent co-workers receive equal pay and pass promotion examinations, and they are tired of being vilified by the public for the lethargy of such colleagues. They would respond favorably to sensible improvements, for the overwhelming majority want to be effective in their work and to have pride in their organization. Therefore, the irreconcilable opposition to civil service reform probably numbers far, far less than one million, and political leaders should be able to deal with such opposition by mobilizing the many latent forces for reform.

But for too long there has been a mutually convenient conspiracy of silence among civil service employees, their unions, and public officials about the quantity and quality of work performed, the productivity of government agencies, and the level of service delivered to the public. Employees received security, generous fringe benefits and pensions, and constantly improving salaries. (The top civil service salary is now close to $40,000.) The unions acquired members and political power. The public officials' reward was the possibility of reelection or reappointment. However, that era is drawing to a close as taxpayers demand better performance and as alert political leaders sense the popular mood.

The time now seems right for a long-overdue reform of the civil service. The intent of reform should be to adapt the civil service system to changing times and changing needs in order to bring about more efficient and more effective government. Several of the steps recommended by us were accepted in New York and are being implemented. Although the procedures will generally vary from state to state, many of the changes needed in the nation's civil service system can be effected by the direct and indirect authority of the chief executives. Other changes may require enlightened rule-making by appointed civil service commissions. Still others will require action by state legislatures.

Inevitably, there will be opposition to any changes, and the dread spectre of the 19th-century spoils system is already being exhumed and summoned to the battlements. Certainly, safeguards will be needed. But the surest safeguard of all is the fact that current political realities have greatly reduced the threat of the spoils system. Today an elected official can best secure his own reelection by creating and maintaining an efficient and effective organization to deliver governmental services to the public. He cannot do this without a competent work force. Trite though it may sound, the best protection against abuses is an enlightened citizenry, demanding performance and ac-

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countability of its government, and aided by a vigilant free press. These conditions exist today in New York, and in other places as well.

The argument for reform is overwhelming. The potential future imperfections of a revitalized personnel system are small and distant compared to the actual weaknesses, large and immediate, of today's illusory merit system. Undoubtedly, the prescription should be applied selectively. Some states and cities are still suffering under a corrupt spoils system and can benefit from the kinds of changes introduced long ago by the *first* wave of civil service reform. By far the most common affliction, however, is the rigor mortis of overdeveloped and regressive civil service systems. If these are reformed, no doubt the time will come again, in another 50 or 100 years, when the disadvantages of the system advocated here will outweigh its advantages. At such time, new reforms—reforms that meet the needs of those new conditions—will again be in order, for no system devised by man works well forever.

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Population growth and economic growth

STEPHEN ENKE

THE old issue of whether population growth is necessary for useful economic growth is now being reconsidered because of a recent U.S. Census Bureau publication predicting reduced fertility.[1] The current "best guess" is that the fertility level of women in the United States has fallen during the past few years to the point where it is now at a replacement rate of 2.1 children per woman during her child-bearing life (ages 14 through 49). Many demographers were estimating only a few years ago that declining fertility would not fall to this replacement level until the 1990's. Because of net immigration, a replacement level fertility of 2.1 children does not mean that Zero Population Growth (ZPG) is anticipated by this projection. But fertility does seem to be declining, and this has predictable economic and social consequences, more of them good than bad.

The Census does not *predict* future U.S. populations. It *projects* them, making various assumptions about mortality, immigration, and fertility. Thus, it is assumed life expectancy will increase about two

[1] U.S. Department of Commerce, Bureau of Census, Series P-26, No. 493, December 1972, "Population Estimates and Projections."

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years for men and one for women by AD 2000, to approximately 70 years for men and 76 for women. Hence, assuming continuation of the present difference in mean ages at marriage, there are still going to be many more widows than widowers. Net immigration is assumed to be 400,000 a year indefinitely, with no change in age and sex distributions, but the size of any annual inflow is really a policy variable. Fertility, the third component, is the one ordinarily considered the most fluctuating and difficult to predict.

The Census makes its projections on the basis of different *assumed* fertility rates (completed family sizes). For example, one projection assumes *ultimate* fertility rates of 2.5 children and another assumes a fertility of 2.1 children. These are rates for females who have not yet entered their child-bearing years: Women who are already aged 14 through 49 are assumed to have a *future* fertility consistent with these ultimate rates. Even though AD 2000 is less than 30 years away, the total populations at that date for the two projections are 283 million and 263 million respectively. Thus each change of one tenth of a child in the ultimate fertility rate means a population difference of about five million, 27 years from now.

The main reasons why the Census has published its new Report 493, replacing Report 470, are (a) the sharp drop in experienced fertility since 1970 and (b) the marked decline in the expected fertility of young wives aged 18 to 24 years during the past five years. For *experienced* fertility, the rate has declined 10 per cent in a year. And as to *expected* fertility, young wives surveyed in 1967 expected to have about 2.9 children, but in 1971 and 1972 they expected typically to have 2.3 children. If allowance is made for women who never marry, these expectations are compatible respectively with completed family sizes of about 2.6 and 2.1 children for all women aged 18 to 24 today—a decline of almost 20 per cent within five years. Such reductions are dramatic news indeed.

If U.S. women were indefinitely to maintain a replacement fertility rate of 2.1 children, and *if net immigration were zero,* population would continue to grow until it attained 277 million around the middle of the 21st century. Zero population growth is hence about 70 million people and 70 years away, even under these circumstances. This is because the age distribution of our population will shift only slowly, until it becomes older and compatible with reduced fertility. Meanwhile, with comparatively too many younger wives in the population, births will continue to exceed deaths. Also, net immigration is not expected to fall to zero, so the new Census information does not mean ZPG even in the lifetimes of our children.

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The uncertainty of fertility predictions

Predictions about fertility are always dangerous—which is why no one population projection should ever be taken too seriously. During the last 25 years, there have been marked changes in the average ages of women at first childbirth. The post-World War II pattern of having children early has now reversed itself for the time being. In part, this may be attributed to the greater difficulty young men and women have had in finding jobs during the past few years. Also, in 1970 paternity ceased to give automatic deferment from the draft. And abortion has become more available in several states during the past few years. But some of the change may be due simply to changing "fashion." In the United States, where it is estimated that four fifths of young couples know a good deal about contraception, relatively ephemeral changes in values can affect fertility to an extent impossible in more backward countries.

Fertility projections based on completed family-size estimates are inherently treacherous. The cohort of women who turned 50 in 1970 and completed their child-bearing years as defined by the Census were 15 in 1935; their next 10 years included continued economic depression followed by World War II, when most young men were away in the armed forces. Women who turned 15 in 1970 will not end their child-bearing years until 2005. Their 35 years of assumed fecundity will be marked by very different circumstances from those of the years 1935-1970. We can only conjecture what some of these changes will mean for fertility.

Ready access to abortion during the first three months of pregnancy seems to have been assured by the Supreme Court decision of 22 January 1973. How much this will reduce fertility is most uncertain because data on the frequency of abortion in this country are so fragmentary. In some Eastern European countries, where abortions are provided by the state on demand and contraceptives are not so readily available, the reported induced abortion rate is *equal to the reported fertility rate*. In the United States this abortion-to-birth rate has probably been about one fourth in states with strict anti-abortion laws. It may recently have been about one half in those states where the laws are liberal or unenforced. If the future national ratio of induced abortions to live births were to double from .25 to .50, this could reduce completed fertility by about one sixth. Fertility would then be slightly below the 1.8 figure. By AD 2000 this would mean a population of 250 million growing by about 950,000 a year, of which 550,000 would be from natural increase and 400,000 from net immigration.

A not too imaginary "science fiction" possibility is that within 10

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years couples may be able to determine with some probability the sex of their next child. Suppose by AD 2000 practically all couples were attempting to do so, and that their probability of success were 0.8. Further, to keep the arithmetic simple, suppose that couples typically will try to have only two children if these include a boy and a girl but that they will always try to have three children if the first two children are of the same sex. Under these "rules for parents," and assuming a .5 probability of a male birth, completed family size would be 2.5 on the average if parents could not influence the sex of the next child. However, under the AD 2000 capabilities described above, completed family size would be 2.2 children. In other words, if these technical innovations were ever widely practiced, ultimate fertility rates might be reduced by one eighth for this reason alone.

Averages disguise almost as much as they reveal. A mean fertility of 2.1 children is consistent with one tenth of women aged 14 to 49 having no children (even though half of this group may be married and want a child of their own), seven tenths of such women having 1.9 children, and two tenths of them having 4.0 children. In the United States there is still a sizable fraction of poor and ignorant women who are not practicing effective contraception and there are women who may have religious inhibitions about abortion. If in fact there are 20 per cent of women aged 14 to 49 who could typically reduce their fertility from 4.0 children to 2.0 children, and if medical science can make possible one child instead of no children to five per cent of women, the average fertility rate for women of child-bearing age would fall from 2.1 to 1.75 children.

Some of these speculations are clearly fanciful. But they illustrate the point that fertility rates over the next 30 to 50 years cannot be predicted with any confidence. Hence, "if-then" projections of population, each based on a single postulated fertility rate, are essentially arbitrary. If a single rate of future fertility for the next 50 years had to be picked, 2.1 children now appears more reasonable than any higher rate, and a consideration of possible future developments suggests that 1.8 might be still closer to the mark. If ultimate fertility rates were slowly to decline from 2.1 today to 1.8 by the year 2000, even though net immigration continued at 400,000 a year, ZPG would be attainable during the latter half of the next century.

Future immigration policy

If a slower rate of population growth is preferable, on balance, for economic and social reasons, future U.S. governments may wish to

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reduce immigration so that attainment of ZPG does not require U.S. parents to reduce their completed family sizes to less than two children. Net immigration depends on practically unrestricted emigration (at least for Caucasians) and selective immigration. Gross emigration to Canada, Mexico, and several other countries is absolutely on the increase. Gross immigration is now far less controlled than it was prior to World War II; quotas have been abolished, and eligibility criteria have been broadened considerably during the past quarter-century.

Reducing the absolute number of immigrants could become a controversial political issue if early attainment of ZPG ever became national policy. During the balance of this century, deaths will average around 2.5 million a year. Thus, an early attainment of ZPG arithmetically requires that net immigration plus births not exceed approximately 2.5 million annually. With a net immigration of 400,000, this in turn means 2.1 million births a year, which is hardly conceivable given current births of about 3.2 million. Even if an annual surplus of 500,000 were permitted, as long as net immigration remained at 400,000, U.S. women would have to limit themselves to 2.6 million births. This would mean an annual prevention of about 600,000 otherwise expected births. If most of these prevented births were also *wanted* births, and the government were deliberately making it more costly to have and rear children, political pressures to reduce gross immigration would seem likely.

The U.S. government would then have to decide not only the number of immigrants to accept, but the basis of their eligibility. One criterion would probably be consanguinity to existing residents. Another might be the possession of useful scientific, professional, and technical skills. Congressmen may be pressured to favor immigration on the basis of family ties; the national interest, however, should probably favor immigrants who are highly educated and have been trained at the expense of other national economies.

Economic consequences of reduced fertility

Analyses of possible ZPG attainment often seem to imply that this would be desirable on environmental grounds. But reduced fertility may also be desirable on economic grounds. As this is contrary to a popular view that population growth is "good for business," it needs some explaining. What mostly makes for higher living standards (i.e., higher GNP per capita) is advances in technology (which increase productivity) and increases in stocks of capital per worker

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(which permit each employee to increase "his" output). U.S. history tends to confirm this assertion. It is true that GNP grew with population, but what counts is improvement in GNP per head, which has risen so spectacularly since the Civil War. Perhaps two thirds of this improvement has been due to compounded technological advances. The other one third is probably due to the rapid increase in investment per head. Initially, some of this investment was financed from Europe, but that flow reversed itself during World War I. Anything that contributes to increased saving and investment within the United States also contributes to a rising national output per capita.

One important determinant of rates of saving from GNP is the dependency ratio. This is the ratio of those too young (under 15) or too old (over 64) to work, to those of work age (15-64). Lower fertility rates make for a lower dependency ratio. This ratio is about .59 today. In AD 2000, with a projected fertility of 2.8, it would still be .59. However, with a projected fertility of 1.8, this dependency ratio would reach .47 at the end of the century.

With fewer dependents per work-age adult, there tends to be a higher rate of saving from output. There is more private saving because families have fewer young and old dependents who must be provided with consumer goods. There is more public saving because governments do not have such large education and welfare expenditures.

A declining fertility rate clearly raises GNP per head. It is at least 15 years—and nowadays more like 20 years—before fewer births will begin to affect the size of the labor force. All who will become employed for the first time between now and around 1990 are already born. Prevented births in the 1970's and 1980's cannot reduce GNP during these years. Meanwhile, there will have been 15 years or more of lower-than-otherwise expenditures for food, clothing, education, and the like, permitting more saving and investment.

Economic-demographic projections can be made with the use of a computer simulation model. Under certain assumptions, including a 2.0 per cent annual improvement in technology and a shortening of the work year by 1.5 days annually for 30 years, GNP per capita can be calculated at future dates under different fertility assumptions. By AD 2030, for instance, per capita output and income for the United States could be $15,400 (in 1970 dollars) if fertility remains at 2.8. However, if fertility were to decline steadily from 2.8 today to 2.1 in AD 2000, and then stabilize, per capita income and output in 2030 would be about $18,100. (By that date many

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industries would probably be operating on two shifts of three ten-hour days each.)

One economic consequence of reduced fertility and higher savings rates is that the productive value of the last million dollars of investment, relative to the last 100 added employees, shifts against capital and in favor of labor. Labor becomes scarcer relative to capital. By 2030 the rate of return on capital could be expected to be lower if fertility has been lower during the intervening decades. Conversely, the real earnings of a full-time employee should typically be higher if fertility rates have been lower. One incidental result is that, to the extent that poorer families earn their incomes from work and richer families from property, there is some tendency towards a more equal income distribution.[2]

The basic reason why U.S. incomes per head would rise more rapidly if fertility rates fell is that there would be more time for capital accumulation to grow ahead of population. High fertility and rapid population growth mean that investment and technology cannot grow as fast relative to population. Real incomes per head must rise more slowly as a result.

Side effects of population growth

Although fertility reductions do bring certain economic and social gains on balance, this is not always for commonly believed reasons, as the following examples may indicate. Many favor ZPG because they wish to reduce pollution and protect the environment. The extent of air and water pollution, noise and litter, and other damage to the environment is more a function of GNP size than population size, however. Pollution might be worse with 300 million people producing a GNP of $4 trillion than with 400 million people producing a GNP of $3 trillion.

Pollution annoyances are often more a matter of lagging technology and legislation than population size. The city of London in the 17th century, before sewers and running water, was in many

[2] Interestingly, *very* low fertility rates over more than half a century could make it economically desirable to raise fertility rates again slightly. If fertility were below the replacement rate, and there were no net immigration, after 75 years firms would find labor very much more expensive relative to capital. At low interest rates, the discounted cost of converting an infant to a trained and healthy worker is reduced. Because of both these changes, the present discounted value of representative infants at birth could become positive, instead of negative as at present. This possibility is no more than an intellectual curiosity in the year 1973, but it serves to make the theoretical point that fertility rates can be too low as well as too high.

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ways dirtier than New York City today. Part of the price of GNP growth and population growth is that an ever larger fraction of the GNP must be used to prevent or counter the pollution that would be tolerable if GNP and population were smaller. Net "enjoyable" GNP can still be larger. But there are gross diseconomies of GNP scale that have to be paid, and anti-pollution activities are one of them.

Population size of itself is not so much the problem. The United States is a very large country and only small fractions of it are as densely populated as is Belgium. Much of the United States that is now sparsely populated could eventually be developed for attractive productive and residential use, just as some (but not all) parts of Southern California are more enjoyable now than 300 years ago, simply because they have been developed. The practical difficulty is that such development takes planning and costs money. Until very recently, only a few U.S. legislators and voters really cared, and they are probably still in a minority. Perhaps within a few decades, however, a majority will be able to insist that industries prevent incidental damage and pollution if technically feasible. The extra costs involved will have to be covered, ordinarily in higher prices paid for the outputs of these industries.

Large population concentrations, as in New York City, are a special problem. Many goods and services (e.g., electric power) can be provided at a lower cost per user when population is concentrated, but certain other services (e.g., preventing violent crimes) seem to become more costly per resident. The reason that such cities grow in population is partly that they enable persons in many occupations to be more productive, sometimes through saving distribution and communication delays and costs. They also offer more sumptuary variety to those with higher incomes. Otherwise, given their higher costs of living (unless offset in part by higher salaries or welfare payments), these large metropolitan areas would begin to empty.

Rapid *regional* growth—whether in Florida, Texas, or California —certainly exemplifies the investment costs of suddenly having many more people around. Enormous investments have to be made in housing, utilities, and schools. However, much of this capital is saved *outside* the region, often in areas that are growing less rapidly. If all the local investment had to be locally saved, consumption levels would have to be much lower—but this is not the case. The investment (or capital) cost of population growth must be looked at not regionally but nationally.

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The impact of declining fertility on business

Many people still believe that population growth is somehow necessary to make business profitable. It is not always clear what "business" means. If "business" is salaried managers, they will tend to earn more if capital is cheap relative to all kinds of labor. If "business" refers to those who own corporate securities, the rate of return on capital may be a little lower, but ordinarily this should be offset by capitalists' typically having more funds to invest.

The belief that population growth is "good for business" may be based on too simple an analogy. For a single business in a particular city, more population may mean more dollar sales for a while, and this may "spread the overhead" and bring in more profits. But over a longer period, a larger city population may mean more competing businesses (among restaurants, cleaners, and beauty parlors, for example), as well as more customers. For local service industries, extra population does not necessarily mean more customers per firm in the long run.

Another aspect of this same fallacy is that, while more customers may mean more dollar sales for a given firm in a particular locality, this is not true of the economy at large. For the nation, the choice 25 years from now could be between more additional customers (with relatively less extra money to spend individually) or fewer additional customers (with relatively more extra money to spend). As explained above, per capita incomes tend to rise more rapidly with declining fertility. U.S. population was larger in 1933 than 1923, but most businessmen preferred 1923 because customers spent more.

Obviously, the impact of declining fertility differs among industries, because of family-income effects, age-distribution effects, and number-of-people effects. Sales of some industries are more income elastic than those of others: Larger family incomes mean more sales for television manufacturers but perhaps smaller sales for potato growers. The sales of some industries are sensitive to age-distribution shifts: A declining fertility rate means relatively fewer children and adolescents, and relatively more senior citizens, with all that this implies for sales of school books, pop records, and medical diagnostic equipment.

Superficially, one might suppose that all industries would tend to have slower increases in dollar sales with declining fertility, because there would be fewer extra buyers. But this is not the case. The quantity of almost every product and service sold varies with buyers' incomes. Fewer people with more money to spend individually may buy as many units of a product as would more people with less

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money to spend. They may also pay a higher price for better quality. Footwear is a good example. A smaller population certainly means fewer pairs of feet to be shod. But each person may buy more and better shoes if there is a higher income per capita.

Changes in fertility really have very little effect on sales and profits as compared with other altering circumstances. Technological change is a far more powerful influence. Diapers are a case in point. Diaper sales should be affected by the number of births if any product is. But the manufacturers of cotton diapers have lost substantial sales, not because of fertility declines, but because of the innovation of disposable paper diapers. The location of a business, especially if retail, is likely to have more of an impact on sales and profits than whether the fertility rate is 2.1 or 1.8. The rerouting of a freeway can make or break a business within a year. Demographic changes take decades to complete their economic consequences.

Will not ZPG adversely affect land values and speculators' profits? In investment affairs, it is discounted present values that really matter and not simply what may occur at some distant date. Assume that a speculator buys a piece of land for $1,000,000 in 1970 and that he can sell it in AD 2000 for $7,600,000 if the interim fertility is 2.1, and for $7,200,000 if the interim fertility is 1.8. The present values of those alternative future sales, at 10 per cent discount, differ by only .001. Over a 30-year period, the value increment of any parcel of land is going to depend far more on changes in taste and technology, local developments, regional migration, and other less predictable circumstances than it will depend on future national fertility.

In any event, the number of annual births in the United States will not fall as a result of fertility rate declines for many years. Estimated births for 1971-72 are 3,407,000. Assuming a 2.1 "replacement" fertility rate, births are expected to increase to 4,224,000 in 1984-85 because of today's young age distribution. Population will be increasing for 75 years or so. No corporate manager can excuse a poor profit showing on grounds of fewer births for several decades.

Do we need a policy on fertility?

If ZPG would be good for the economy, not harmful to business, and beneficial for the environment, should not its attainment, sooner rather than later, become a national objective? The United States—unlike France, for example—has never had an explicit fertility policy. However, it has always had an implicit pro-natalist policy, including laws against abortion and contraception in some states, free public

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education, income tax exemptions for dependents, and so on. The effect of such provisions is to encourage fertility by making birth control difficult and children less expensive. Perhaps the time has come, not to eliminate free education, but to counter various pro-natalist consequences with explicit *anti*-natalist taxes and subsidies.

An immediate question is whether this will be necessary. If parents reduce their fertility sufficiently below the replacement rate, so that the deficit of births below deaths in time compensates for net immigration, federal and state action may be quite unnecessary. Some demographers feel that something approaching ZPG will eventually result if there are no longer any unwanted births. Current federal programs to assist indigent women in practicing contraception are contributing to this outcome. Legal abortion may have a greater impact on fertility than is yet realized.

Yet even though there may be fewer unwanted children in the future (and hence fewer babies for adoption), some observers wonder whether there may not also be more *wanted* children. Medical techniques, including artificial insemination, are being used more frequently to assist sterile couples to have children. But more important, over the next 50 years increasing leisure and consumption levels may cause more couples to want and to have additional children as consumption goods. Along with the third TV and third car, as a deliberate consumer decision may come the third child. If this ever threatened to become a typical behavior pattern, an explicit national policy favoring "replacement" fertility and reduced immigration would become an urgent necessity.

The possibilities for government action are obviously limited in a free society. The most that federal and state governments can practicably do is financially to reward parents that have fewer children and penalize parents that have more children. This could be done through the income tax, for instance. Exemptions, increasing with the age of the taxpayer, could be given for not having children instead of for having them. In this way, at each taxable income level, less fertile parents would not be subsidizing more fertile couples to the extent that they do today. (The children of really poor parents would not suffer because the latter do not pay income taxes.)

The time is coming when having "large" families, i.e., above the replacement level, will be considered anti-social. With abortion and contraception available, "excess" children will be considered *wanted children*, and parents may have to suffer the usual penalties of anti-social behavior. Large families are today subsidized by small families—but this may not be true by AD 2000.

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The auto pollution muddle

LAWRENCE J. WHITE

AFTER two months' exposure to hearings, testimony, and intensive lobbying, William D. Ruckelshaus, Administrator of the Environmental Protection Agency (EPA), decided on April 11 to suspend for one year the 1975 federal standards on automotive pollution and to replace them with interim standards. Among the participants in the previous two months' activities had been the automobile manufacturers, pollution control equipment manufacturers, petroleum companies, environmentalists, and even the United Automobile Workers. The decision was a compromise and, like most compromises, was promptly condemned by all parties. Appeals to the courts and to Congress are likely to follow, and it is clear that the issue of automotive pollution controls will continue to command the attention of the executive, legislative, and judicial branches of the federal government and of many state and city governments for the next few years.

This governmental attention is not frivolous or unwarranted. Automotive air pollution represents a classic example of externalities: Motorists are inflicting uncompensated costs on others by driving automobiles which emit pollutants. This is a situation that the normal functioning of markets cannot handle, and it is clear that some corrective government action is warranted.

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What is much less clear is what kind of government action is best in the present circumstances. Current federal legislation has chosen to deal with this externalities problem by directly specifying emission standards that automobiles must meet before they can be sold. This has culminated in a set of standards for the 1975 and 1976 model years which represent the severest technological challenge that the automobile industry has had to face in its 70-year history. These standards have the advantage of specificity and universality, and they mandate radical reductions in auto pollution levels. But the standards and their administration are also plagued by several inherent dilemmas—some of which confronted Mr. Ruckelshaus this past April, and others of which will become apparent only in the future. In these pages, I propose to review the current state of pollution control policy and technology, and to demonstrate that an alternative policy strategy, one based on an effluent charge, is preferable in almost every respect.

Federal policy today

Hydrocarbons, carbon monoxide, and nitrogen oxides are the principal ingredients of the auto pollution problem. The first two compounds are emitted primarily as a consequence of incomplete combustion of fuel within engine cylinders. Nitrogen oxides are formed as an independent by-product of heat in the cylinders. The hydrocarbons and nitrogen oxides react photochemically in sunlight to produce the mixture of ozone and nitrogen-hydrocarbon compounds that we call smog. Smog reduces visibility, impairs breathing, and stings the eyes. Carbon monoxide, which tends to replace oxygen in the bloodstream, can cause death in high concentrations; in lower concentrations it appears to impair nervous system functions, especially among persons with heart or lung illnesses.

The deleterious effects of high concentrations of these pollutants have been demonstrated under laboratory conditions. Thus if automotive pollution control were costless, there would be an overwhelming case for proceeding with pollution controls, in order to guard against the risk that the health costs of current pollution concentrations might be great. But pollution control is not costless, and therein lies one of the crucial dilemmas. This is especially so because, as yet, we have no definitive knowledge of the specific health and other costs that result from current concentrations of auto pollutants in our atmosphere. The reduced visibility and personal discomfort from smog in some metropolitan areas are evident, but other

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health costs are more evasive. This does not mean that these health costs are necessarily absent—only that we have not discovered what, and how large, they are. But until we can measure these, we shall not have much basis for deciding how much we should spend on how large a reduction in automobile emissions.

As a result of legislation passed in 1965, the U.S. government first specified maximum hydrocarbon and carbon monoxide emission levels for the 1968 model automobiles. In subsequent years, these limits were tightened, controls on gas tank and carburetor emissions were instituted, and limits on nitrogen oxide emissions were specified. In 1970, a series of amendments to the Clean Air Act mandated that automotive emissions be reduced by 90 per cent from 1970 levels. Hydrocarbon and carbon monoxide emissions were to meet this stringent standard by the 1975 model year, and nitrogen oxide emissions were to meet it in the 1976 model year. The amendments also specified that these limits must be met for the first five years or 50,000 miles (whichever comes first) of the automobile's life.

Initially, the EPA translated these standards into the following specific terms: 1975 model cars could emit no more than 0.41 grams of hydrocarbons per mile, 3.4 grams of carbon monoxide per mile, and 3.1 grams of nitrogen oxides per mile. 1976 model cars would be limited to only 0.4 grams of nitrogen oxides per mile. But on April 11 of this year, for reasons to be discussed below, these standards were suspended, and less stringent interim standards were set. These different sets of standards are compared in the accompanying table.

Mandated Auto Emission Standards (grams per mile)

	Hydro-carbons	Carbon Monoxide	Nitrogen Oxides
Uncontrolled car	8.7	87	3.5
Original 1975 standards	0.41	3.4	3.1
New interim 1975 standards	1.5	15	3.1
New interim 1975 California standards	0.9	9	2.0
Original 1976 standards	0.41	3.4	0.4

The EPA has also specified the test procedure that automobiles must pass in order to be certified for sale. The car is allowed to stand for 12 hours at a temperature of 60° to 86° F. It is then started (a "cold start") and driven on a test stand through a series of cruises, accelerations, and decelerations. It is stopped, started again (a "hot start"), driven some more, and finally stopped. The emissions are collected and analyzed and checked against the standards. This 41-minute test will be applied to each production model submitted by

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the automobile manufacturers. The cars will be tested, then driven for 4,000 miles around the clock, tested again, driven for 4,000 miles more, tested again, etc., until 50,000 miles are reached. If the cars are still under the specified emission limits at 50,000 miles, they pass the test and future production of those models can be sold. It is likely, however, that the testing of early samples will be followed by production line audits and testing as the model year progresses.

The manufacturers' response

There are four basic strategies by which the manufacturers can attempt to bring automobile emissions into compliance with these standards. They can (1) modify the engine and its attachments so that, within the cylinders, combustion will be more complete and the formation of nitrogen oxides discouraged; (2) add devices to oxidize or burn hydrocarbons and carbon monoxide, and to reduce nitrogen oxides to nitrogen, after these compounds have left the cylinders; (3) redesign the engine in more fundamental ways so as to improve combustion; and (4) devise sources of motive power other than the internal combustion engine.

The American automobile companies and most foreign manufacturers have chosen a mixture of strategies (1) and (2). This is not too surprising. Given the time constraints, these were the safest strategies. The present internal combustion engine is what they know best, and it is what they believe in. A few foreign manufacturers have chosen strategy (3). No major manufacturer is presently concentrating on (4). Though research on steam engines, turbine engines, and electric vehicles continues, the major technological breakthroughs that would make these power sources competitive with the internal combustion engine have not yet been made.

More specifically, U.S. manufacturers have developed the following engineering package to meet the 1975-76 standards:

1) An improved carburetor has been developed that will offer more accurate fuel metering and that will automatically compensate for changes in altitude and temperature. Eventually, the carburetor may be replaced by even more precise fuel injection systems, but this does not seem likely for 1975.

2) Since a large proportion of the pollution emissions occur within the first few minutes of a cold start, special efforts have been made to reduce cold start emissions. These include heating the air-fuel intake mixture to improve fuel vaporization, and using a fast-acting choke that will provide a lean mixture sooner than is the case now.

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3) Electronically controlled ignition will replace the breaker points in present cars. The timing of the spark ignition is crucial to proper combustion, and breaker points are considered too susceptible to timing misadjustments.

4) A valve will be used to recycle 10 per cent of the exhaust gas into the intake manifold in order to reduce the formation of nitrogen oxide. This exhaust gas recirculating valve (EGR) is already in use on 1973 models. Recycling reduces combustion temperatures, which in turn retards nitrogen oxide formation—at the cost of somewhat poorer combustion, more hydrocarbon and carbon monoxide emissions, poorer fuel economy, and poorer acceleration capabilities.

5) Air pumps will be placed at the exhaust ports of the cylinders to aid oxidation of exhaust gases, which in turn will lower the concentrations of carbon monoxide and hydrocarbons.

6) On cars sold in California in 1975, and on all cars sold in 1976, catalytic converters will be placed in the exhaust manifolds to oxidize the remaining hydrocarbons and carbon monoxide. For 1976, a second, reducing catalyst will be added to transform the nitrogen oxides to nitrogen. The durability of these catalysts is somewhat in question. They will be exposed to extreme temperature changes and to the rough bouncing of automobiles over bad roads. Moreover, they are easily poisoned by lead emissions, so lead-free gasoline will be required for the models with catalytic converters. (The exhaust gas recycling valve is also susceptible to malfunctioning from lead emissions.) This in turn will require lower compression ratios for the engines, and consequent losses in fuel economy and acceleration. Also, specially designed gas tank openings on these cars, and gas pump nozzles on the lead-free pumps, will be required to ensure that owners of these cars buy only lead-free gasoline.

The only major alternatives to this package are likely to be offered by foreign manufacturers. The Mazda car, produced by Toyo Kogyo of Japan, presently offers a rotary cylinder Wankel engine that has already demonstrated its ability to meet the original 1975 standards. (The Chevrolet Vega may also have a Wankel engine option by 1975.) The Wankel engine has fewer moving parts, runs more smoothly, and is smaller and lighter than the conventional internal combustion engine. This last feature means that there is more room under the hood for the auxiliary pollution control equipment. The Wankel tends to use more fuel and to emit more hydrocarbons and carbon monoxide but less nitrogen oxides than the conventional engine. Since the former pollutants are considered relatively easier to clean up than the latter, this pattern of emissions is in its favor. A reactor

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to burn the exhaust gases, instead of the catalytic converter, may be combined with the Wankel.

The Honda automobile, also produced in Japan, is likely to have a stratified charge engine. This is like a traditional internal combustion engine, except that there is an extra small chamber in the cylinder head. A rich fuel-air mixture is fed to the small chamber and is ignited by the spark plug. This burns and spreads to the main cylinder chamber, in which a lean mixture is present. The lean mixture explodes and drives the cylinder in the usual fashion. This configuration seems to provide very low emission levels and may not require any supplemental catalytic converters. Though the stratified charge engine is not yet in full commercial production, Honda's preliminary models have been able to meet the original 1975 standards.

Finally, the diesel engine used by Germany's Mercedes-Benz on some of its models has also shown it can meet these standards.

The "fewness" problem

Viewed from one angle, current federal auto pollution policy is the essence of simplicity. Strict standards are set; cars that do not meet the standards may not be sold. (Technically, the Clean Air Act does not forbid the sale of cars. It specifies a fine of $10,000 for every car sold that does not meet the standards—which amounts to the same thing.) But the EPA's 1975-76 standards were far in excess of what automobile technology was capable of achieving at the time they were set. Setting specific standards is one way of inducing the technological change necessary to attain more effective emissions controls. But when coupled with the threat that cars not meeting the standards cannot be sold, such strict standards inherently create a serious risk for the overall success of the program. The reason for this risk is to be found in the "fewness" problem.

There are only four domestic automobile manufacturers, three of which are among the largest seven manufacturing companies in the nation. (A large truck manufacturer, International Harvester, also comes under the law due to its manufacture of large station wagons.) If one meat packer out of 2,500 had to close down because it could not meet government sanitation standards, few outside of a handful of workers and owners would be affected. But if one or more of the four automobile firms were to fail to meet EPA standards and were required to shut down, the structural consequences for the industry, and the employment consequences for the economy as a whole, would be quite serious indeed.

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This aspect of the fewness problem almost emerged into the crisis phase a year ago. In the spring of 1972, Ford revealed that it had followed improper testing procedures in trying to get its 1973 models certified as meeting the 1973 EPA standards. Ford was required to retest its models, and did so successfully, but the retesting was not completed until September, just before the new model introduction. If most of the engines had failed the second time, the existing law was clear: EPA would have been required to shut Ford down. Is this something that the public and Congress would have tolerated, especially in an election year? And would there have been any equitable way out of this dilemma, given that the other companies' cars had passed?

One consequence of the fewness problem, then, is that it makes federal policy virtually unenforceable against manufacturers or models that do not meet the standards. This in turn creates a second problem—the possibility that the manufacturers will not make every conceivable effort to meet the standards. By setting specific standards, EPA gave the parts manufacturers, chemical manufacturers, and catalyst manufacturers a clear incentive to try to develop control systems and parts which they could sell to the automobile manufacturers. The incentives for the automobile industry, by contrast, have been less clear. On the one hand, the auto industry cannot really benefit from the rapid development of costly control technologies which offer no private benefits to motorists and might even make their cars run more poorly. (The only possible benefit to the domestic industry is that the high standards may cause some foreign manufacturers with low-volume sales in the U.S. to withdraw from the U.S. market.) Under these circumstances, the automobile industry had no positive reason to make an all-out effort to meet the EPA's standards on schedule. This was especially so because, in the end, it is the automobile industry which will decide whether the technology is available to produce 10 million cars a year that can meet EPA standards. If a crunch comes, Congress is unlikely to allow EPA to close Detroit down.

On the other hand, the automobile industry did not want to incur bad public and Congressional relations by obviously dragging its feet in developing a pollution control technology. Thus federal policy did provide some incentive for making an effort—a serious, if not an all-out effort—to meet the EPA standards. And this is more or less what has happened. There definitely has been considerable progress in control technology. As late as the spring of 1972, there were serious doubts as to whether the 1975 standards could be met under any

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circumstances; by April 1973, it was clear that General Motors definitely could, and Ford probably could, meet the standards. This progress was a joint achievement of the auto companies and of the parts, chemicals, catalyst, and petroleum companies. Still, the progress was not fast enough, and EPA, in deciding to suspend the standards, all but accused Chrysler of bad faith in not pursuing research fast enough.

Not only has progress been slower and less uniform than originally desired; it has also been along the most conventional lines of technological development. The U.S. companies have focused their attention on minor modifications of the existing internal combustion engine, rather than on more fundamental changes in the internal combustion engine—such as the Honda or Wankel engines—or on the development of alternative power sources. EPA Administrator Ruckelshaus, in his decision to suspend the 1975 standards, commented that "all of the applicants have evidenced a slowness to pursue alternate technologies that I have found both disturbing and frustrating. . . . The manufacturers generally may have demonstrated undue conservatism and a lack of foresight in not pursuing alternate systems more vigorously." With only a few domestic manufacturers in the field, there are not many independent sources of—or incentives for—innovation in developing new power sources.[1] Here, too, we find the fewness problem, combined with the strategy of specifying rigid standards and prohibiting substandard cars, hindering the national effort to reduce automobile emissions.

The EPA decision to suspend the 1975 standards

The Act gave the EPA the power to delay the enforcement of the 1975 and 1976 standards by one year each. To do this, the EPA was required to find that (a) the delay was in the public interest; (b) there had been a good faith effort to meet the standards; (c) the technology to meet the standards was not available; and (d) a study by

[1] Lately there has been increasing interest in the development of alternative technologies as a strategy for eliminating automotive pollution. A recent article by Jacoby and Steinbruner has argued that a large-scale federal research program should be mounted to achieve the major breakthroughs required for new power sources, and that such a program would be cost-effective compared to present pollution control efforts. However, the achievement of these breakthroughs is not at all certain. Also, there are less expensive ways to improve the cost-effectiveness of the current control program; it will be argued below that an emissions tax is the best way to do this. And finally, if the companies are relieved of the intense deadline pressures of the present program but are subjected to the economic pressures of, say, an emissions tax, they may of their own volition devote more of their efforts to new technologies.

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the National Academy of Sciences indicated that the technology was not available.

In early 1972, the automobile companies requested a delay of the 1975 standards. EPA denied this request in May 1972, claiming that it was then too early to decide whether or not the technology would be available. The companies appealed this decision to the courts, and in February 1973 the U.S. Court of Appeals for the District of Columbia remanded the case back to the EPA for a rehearing that would more fully include the economic consequences of denial.

After two months of hearings, the EPA decided on April 11, 1973 to suspend the 1975 standards and to establish the interim standards mentioned earlier in this article. The primary basis for the decision was EPA's belief that the catalyst technology, which the American companies had chosen in their effort to meet the 1975 standards, was not yet developed enough to ensure the adequate production of enough cars that would meet the standards. The EPA found that "it is feasible to mass produce catalyst-equipped cars in 1975 but that the use of catalysts on all cars sold in this country in 1975 would entail a significant risk of economic dislocation arising from the inability to acquire a supply of acceptable catalysts, problems on the assembly-line, or both. These risks could materialize abruptly, and force the unplanned cessation of production, with attendant layoffs of employees and possibly serious disruption of the national economy." The EPA concluded, as "confident minimum" estimates, that General Motors was likely to meet the 1975 standards with 93 per cent of its sales, Ford with 55 per cent, American Motors and International Harvester with 26 per cent, and Chrysler with zero per cent. The overall average was likely to be 66 per cent, and that was not "sufficient to satisfy basic demand." Thus, in this sense, the technology was not available, and a delay would be in the public interest.

The February report by the National Academy of Sciences, released five days after the Circuit Court's remand order, had concluded that the technology for compliance with the 1975 standards was available and effective. The EPA nevertheless decided that the Academy had not sufficiently taken into account the risks of manufacturing failures and that therefore the Academy's conclusions were not binding.

The special interim standards for California were made strict enough to require catalysts on cars produced for sale in that state. This was designed to give the auto companies adequate experience with the manufacture and use of the catalyst systems, without requiring the entire nation's production volume to be subjected to the initial uncertainties. (The EPA's decision, however, never explained how it

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expected Chrysler, which it considered to be wholly unprepared for the use of catalysts in 1975, to meet the interim California standards.) The national interim standards were set so as to achieve a reasonable restriction in emissions that would require all of the other components in the control package but would not require the use of catalysts on most cars. The EPA did expect, however, that *some* cars sold nationwide would need catalysts to meet even the interim standards. The experience gained on these vehicles and on the California cars would make easier the application of catalysts nationwide in 1976. The year's delay is not sufficient time for Detroit to produce significantly greater numbers of Wankel or stratified charge engines, and the EPA was not counting on this occurring, although it clearly hoped that Detroit would give more consideration to these kinds of engines in the future.

Though the EPA decision mentioned a number of the policy problems raised in the preceding pages, it was clearly the fewness problem that primarily concerned the EPA. Chrysler was unprepared to meet the 1975 standards, and the EPA decision all but accused Chrysler of deliberately dragging its feet and hence of failing the good faith test. The *Wall Street Journal* quoted EPA Administrator Ruckelshaus as saying that if Congress had provided "some sanctions short of the nuclear deterrent of, in effect, closing down that major corporation, my finding on good faith may have been otherwise." Further, there was the possibility that one or more of the other manufacturers, despite their good faith efforts, might experience manufacturing problems and be forced to cease production and sales. The disruption consequences of this drastic sanction were simply too great to be risked.

Testing, maintenance, and other conundrums

Fewness is not the only problem of the present controls program. Testing, maintenance, and inspection combine to pose another severe dilemma. If the pollution control device consisted of a maintenance-free black box that was sure to last 50,000 miles, there would be no problem. But as is clear from the description above, the control technology is a complex set of attachments and adjustments to the engine and exhaust system, and its efficiency depends on the proper performance of the entire engine and its attachments. This will require more maintenance and replacement of components than is currently practiced and therefore will be more costly. Some of the maintenance will involve things like replacing spark plugs and oil

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filters, which improve the general performance of the car. Yet some individuals do not now perform this normal maintenance, and their behavior is unlikely to change.

Moreover, some maintenance, such as replacing the catalytic converter, will *not* improve performance. It appears certain that the catalysts will require replacement at least once in 50,000 miles. And if the exhaust recirculating valve were to become clogged, the car's gas mileage, handling, and acceleration would improve. Therefore it would be in the motorist's private interest not to have it repaired. Even if this maintenance were to be provided free by the companies—which is unlikely—the time and inconvenience costs would deter some motorists from taking advantage of it.

Hence, if pollution levels of cars in actual operation are to be kept at the levels specified by the 1975-76 standards, maintenance must somehow be enforced. This is true also for the interim standards. If sensing devices were well enough developed and durable enough, they could be placed in the exhaust to detect excessive pollution levels. They could then trigger devices that would prevent the car from starting again, or cause horns to blow or external lights to flash. But this technology is not currently available.

The only realistic alternative is a system of compulsory periodic inspections of automobiles—say, at annual registration time. This is a function that has traditionally been reserved to state governments. But only New Jersey will have an annual compulsory emission inspection program in operation by 1975. California is likely to have a roadside spot inspection system. Some states currently have safety inspection programs which might, with some effort, be expanded to include emission inspections, but most states have yet to make the necessary preparations. Since there is probably at least a four-year period involved in the preparation of the necessary state legislation (passing it, acquiring the necessary property, building facilities, hiring personnel, training personnel, testing the inspection program, and actually enforcing the inspection program), it is likely that only a handful of states will have emission inspection systems operating by 1975. In their absence, it is difficult to see how the necessary maintenance will occur.

There are two additional twists to the state inspection problem. The federal standards are based on the 41-minute test, which requires a 12-hour waiting period beforehand. This would be extremely difficult to arrange for the inspection of all cars on the road. As a consequence, a short "hot-start" test, requiring no prior waiting period, is likely to be used for state inspections. (A hot-start test is being used by New

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Jersey.) But it will be virtually impossible to find any hot-start test that will correlate perfectly with the federal test. The federal test is designed to catch cold-start emissions, which no hot-start test is likely to catch. Thus, if the state tests were precise enough, they would be likely to pass some cars that would fail the federal test and fail some cars that would pass the federal test.

Further, the federal test is likely to be based on an averaging of the sample vehicles, rather than on a requirement that every single sample vehicle pass the test. Averaging makes sense, since it is average emissions that affect atmospheric conditions. Also, the engineering required to ensure that every vehicle passed the test would be considerably more difficult and might prevent any company from passing. But averaging implies that some vehicles may be sold whose emissions are above the federal test limits, even at the time of sale. Some of these vehicles may even be incapable of ever meeting the federal standards. Precise state inspection tests would catch these vehicles, and their owners would face, at a minimum, extra costs and inconveniences.

The absence of state inspection, of course, would conveniently eliminate these problems, but at the cost of not enforcing maintenance. Any state inspection systems that may be established are likely to be much less precise than the federal test and to be aimed essentially at detecting gross malfunctioning of pollution control systems rather than small deviations from the federal standards.

The warranty-repair dilemma

The Act calls for the manufacturers to provide a five-year/50,000-mile warranty on the operation of the control system. The intention is to encourage maintenance by reducing its immediate consumer cost. With the absence of state inspection to enforce the federal standards, most warranty claims have probably been eliminated, which may be a blessing in disguise. Proper operation of the entire engine and attachments is necessary for pollution control; in essence, the entire engine would be warranted. But warranties in the past have provided huge headaches to manufacturers, dealers, and consumers alike. Consumers tended to misunderstand what the warranties covered, and dealers complained that they were not being properly compensated by the companies for warranty repairs. Warranties were extended to five years or 50,000 miles in the mid-1960's but have since gradually contracted to today's 12-month/12,000-mile warranty. A revival of the longer warranty would also revive those headaches.

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Further, if the auto companies were going to be held accountable for defects in the control system for five years, they would be likely to insist that all engine maintenance be done under their own supervision—i.e., by their dealers—and with their own replacement parts. Otherwise, they would claim, they would have to be correcting the mistakes of others. Yet this insistence could lead to a serious restructuring of the automobile repair market toward franchised dealers and toward auto company produced parts. Independent repair services and independent parts manufacturers would be likely to lose a substantial share of the market.

A connected point here concerns the method of payment for maintenance of vehicles. In the absence of state inspection and enforcement, motorists will be reluctant to undertake maintenance operations like changing the catalyst, the market cost of which may be as high as $100 or $150. This would argue for requiring the manufacturer to provide the replacement catalyst free of charge, or even to pay motorists to replace their catalysts. (The manufacturers would undoubtedly include this replacement cost in the original price of the car.) But this would prevent parts manufacturers from competing in the replacement catalyst market. Unless state inspection systems force this kind of maintenance or unless motorists are given some kind of public subsidy to purchase catalysts, this dilemma of low cost versus the shutting out of competitors cannot be avoided.

The costs of the present program

Everyone would like pollution controls to be 100 per cent effective and to entail zero additional cost. Unfortunately, as we are often reminded, there is no such thing as a free lunch, and the present automotive pollution control program is no exception. Beginning in 1976, automotive pollution control should be 95 per cent effective (compared to an uncontrolled car) for all of the first five years of the life of a new car. In passing, though, it is important to note that over 50 per cent of the cars presently on the road are over five years old and that this fraction is unlikely to change substantially in the future. The present program makes no provision for pollution control after the fifth year of a car's life (in reality, after 50,000 miles on the test cars); emission levels are sure to increase in the sixth and later years of a car's life.

The cost of achieving these emission reductions will not be small. The pre-1975 control equipment has cost approximately $120 per car. The equipment needed to meet the interim 1975 standards is likely

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to add slightly more than $100 per car. The addition of the oxidizing catalysts on all cars in 1976 will add $60 more; the addition of the catalysts to reduce nitrogen oxides in the same year will cost another $60 or so. The additional fuel and maintenance costs from the pre-1975 and post-1975 equipment are likely to run as high as $50 to $75 per year. For a 10-million-car year in 1976, these costs will total around $4.0 billion. By 1980, the annual costs will be around $6.5 billion: $350 in equipment costs per car for 10 million new cars plus $50-75 extra maintenance and fuel costs per car for the 50 million cars on the road which will possess control equipment.

Even in a $1400 billion economy, these costs will be significant. They will be largely borne by car buyers, for it is clearly unrealistic to assume that they will somehow be absorbed by the auto companies. There will also be further costs in decreased drivability and decreased consumer satisfaction with these cars.

Are the controls worth the cost? Unfortunately, as was pointed out earlier, since we still do not have a clear measure of the benefits from clean air, it is difficult to know where to strike the balance. Also, the impact of costs and benefits appears to be uneven. Iowa farmers will be paying for pollution control equipment that will probably provide no benefits for them.

Until now the political balance has favored tighter controls. It will be interesting to see if this continues to be the case after the costs of the 1975-76 controls are felt. There is a distinct danger that consumer dissatisfaction with the money and inconvenience costs of the 1975-76 controls could lead to a reaction against all future pollution control efforts. This would indeed be an unfortunate final result of the present program.

An alternative: the emissions tax

Is the present program the most efficient way to achieve pollution control? Most economists would argue otherwise. The economist's standard prescription when confronted with a question of pollution is to ask for an assessment of the marginal damage from the marginal act of pollution and to recommend a tax on the pollution act equal to this damage. This leaves the actor free to pay the tax, correct the pollution, or cease the action altogether, depending on which he finds most advantageous. The basic principle, though, is that the tax forces him to take into account the costs that he has inflicted on others through his polluting act. For automotive pollution, this would involve assessing the marginal damage from emissions in various

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areas and then taxing emissions. If direct metering of emissions were not possible, taxes could be levied by mileage, with periodic inspections to determine the level of emissions. Or since gasoline consumption correlates highly with mileage and emissions, extra taxes could be levied on gasoline, with periodic rebates given to those car owners who showed low emissions at inspections. Car owners in areas in which pollution damage was negligible would be exempt from taxes.

These taxes, or effluent charges, would strike all automobile drivers rather than just new-car drivers. This seems sensible since all cars emit pollutants. These taxes would provide motorists with a direct incentive to keep their cars tuned and maintained and to seek out low-cost means of controlling emissions. Parts manufacturers, chemical manufacturers, and even the oligopolistic automobile industry would be likely to respond to consumers who would be willing to buy devices and systems to avoid paying the pollution taxes.

Pollution taxes have frequently been termed "licenses to pollute," but they should really be seen as a payment to society to cover the costs that the pollution has inflicted. Their overwhelming advantage is that they would leave individuals free to seek out the lowest-cost, most efficient means of curbing the pollution and thus avoiding the taxes. They would require an inspection system to ascertain each motorist's emissions, but, as we have seen, the current control program, if it is really to be effective, also requires an inspection system to enforce maintenance.

A system of pollution taxes would avoid virtually all of the administrative dilemmas that bedevil the current control efforts. The testing-maintenance link would be firmly established as a natural part of the tax program, rather than an awkward complication, as it is in the present program. Warranty problems would diminish if firms were not required to issue warranties. And competition in the provision of control devices would be opened to all comers.

Most important, a system of pollution taxes would eliminate the "brinksmanship" of threatening to close down one or more automobile companies if they do not achieve specific control levels by a specific date. The automobile companies are too big and too important for Congress to be able to use such threats as effective policy tools. The April decision to suspend the 1975 standards is adequate testimony to this proposition. By contrast, an emissions tax that fell on the cars that failed to achieve satisfactory control levels would induce corrective action by the companies involved. The question of good faith need not enter. The tax would not need to threaten total closure of the companies, and yet it would be painful. Consum-

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ers' purchases are sensitive to these kinds of relative cost considerations; we would not find Chevrolet, Ford, and Plymouth pricing their cars so closely together if this were not the case.

A less drastic change away from the present program would be a realistic graduated emissions tax on the sale of new cars which failed to meet pollution control standards. This would be a distinctly inferior alternative to the direct pollution tax suggested in the previous paragraphs, since it really would not affect marginal behavior, encourage maintenance of older cars, or ease most of the administrative difficulties of the present program. But at least it would ease the "brinksmanship" problem by providing a strong incentive for firms to meet control standards, without resorting to the threat of forcing a company to close down.

It is one thing to inflict financial pain, by means of an emissions tax, on a company which knows it will survive and knows it has the time to remove the cause of pain in the future. It is another thing to threaten to shut down the company. The former is probably credible and achievable; the latter, as we have recently seen, is certainly not.

Crucial to a pollution tax system—but also crucial to any sensible control program—is the ability to assess accurately the damages from automotive pollution and hence the benefits from pollution control. At present, this does not seem to be feasible. But whatever benefits are expected from the current control effort, there is a set of pollution taxes that could achieve this magnitude of benefits at less cost than the current program and without its administrative difficulties.

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CURRENT READING

Is the Census Reliable?

The principal data used by most social scientists in studying national trends and problems are those provided by the U.S. Census Bureau. Hence the accuracy of such studies can be no greater than the accuracy of the Census data themselves. It has generally been assumed that these data have a high degree of reliability—or at least that the Census Bureau has a fairly good idea of its possible margin of error, which it acknowledges in the fine print of its reports.

But a recent New York City Rand Institute report by C. Peter Rydell indicates that the confidence researchers have in Census statistics may be seriously misplaced. Rydell compared Census estimates of the amount of welfare in New York City in 1969 with estimates derived from statistics provided by the City's Human Resources Administration, the agency responsible for the disbursement of welfare payments in New York. On the basis of these easily available data and some relatively simple calculations, he came up with a startling series of results: *the Census underestimated the total amount of welfare grants by 41.1 per cent* (City=$883 million; Census=$520 million). *And it underestimated the total number of welfare cases by 39.0 per cent* (City=477,000; Census=291,000). The magnitude of this discrepancy is underlined by the radically different estimates of the percentage of the population on welfare to which the two sets of figures lead. The City's statistics indicate that 16.1 per cent of New Yorkers received public assistance, while the Census figures indicate a welfare population of only 11.1 per cent.

After showing that other factors could not possibly account for such discrepancies, Rydell concludes that they are due to "systematic bias resulting either from failure of the Census to account for the entire population [i.e., to find all those on welfare] or failure of respondents to give the correct information [i.e., to admit to Census takers that they had received welfare payments]." There was insufficient information available for Rydell to separate out the relative importance of these two possible sources of error, but the Rand Institute is now engaged in a new study which should offer further insights on this question.

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Rydell ends his report with two suggestions for remedying the problems which his work has brought to light:

> The first is that the Census should check its numbers against other government records before publication. Why rely exclusively on sample surveys where complete accounting records exist? Since this suggestion is likely to raise the question of who pays for all the checking, the second conclusion is that the Census should at least warn its users, in the technical appendices of its reports, about the nonsampling errors of its surveys. Currently, the appendices give little warning that the problem exists or any discussion of which items of information are most likely to suffer from systematic biases.

Rewards for Radicals

The *Insurgent Sociologist* is, as its title suggests, a journal for those who are in opposition to "Establishment Sociology." Yet for all their distaste for the "careerism" of their less radical colleagues, these "insurgents" apparently are not doing so badly themselves. The Spring 1973 issue of the journal prominently displayed this announcement:

> New Midwest research institute has an immediate opening for a radical Ph.D. sociologist or social anthropologist with at least one year of post-doctoral experience. Will do research on some aspect of contemporary American society of own choosing, but preferably on the social changes of American Indians and Chinese immigrants. *Salary $15,000-$20,000 for nine months.* Send resume to: G. Fong, Midwest Institute, 42½ East 8th Ave., Columbus, Ohio 43201 (italics ours).

Profits for Panthers

In an interview with *Publisher's Weekly* (April 23, 1973), Black Panther leader Huey Newton reminisced about the problems of writing books in prison. Among these he cited the fact that California prisons—where Huey had secretly tape-recorded the material used in his most recent book—took a percentage of the sales revenue from books written by inmates:

> Huey couldn't remember whether it was 25% or 15% they took, "But as far as I was concerned, one percent was too much!" He acquired an agent, Marty Kenner, who now represents a number of Panthers in their literary deals (as well as the Tupamaro revolutionaries in Uruguay), and a sort of Panther publishing company was set up to handle the financial dealings. It is called Stronghold Consolidated Productions, and Huey's book is copyrighted by it. Stronghold also handled the late George Jackson's "Blood In My Eye" and "Soledad Brother," and currently has a record by Elaine Brown with Motown.

An Old Story

A more old-fashioned tale of radicalism-to-riches was related by Stanley H. Slom in the *Wall Street Journal* (April 4, 1973):

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ONEIDA, N. Y.—The old commune's philosophy strikes a familiar chord in this day and age.

Women were granted an equal role with men in managing its affairs. Marriage was abolished, and children were looked after in a day-care center. Every day, members met in a form of group therapy, called "mutual criticism." They referred to themselves as "Bible Communists."

But the commune's spiritual orientation didn't exclude materialistic gains. In fact, it decreed that "to prosper is good."

This all transpired more than a century ago. Today, the talk around Oneida is apt to be about import quotas, dollar devaluation and market share. For that original commune, known as the Oneida Community, has prospered and evolved into Oneida Ltd., a publicly held international concern that is listed on the New York Stock Exchange and that is the nation's largest maker of stainless-steel tableware.

The social ways of the share-the-wealth commune dissolved in the late 19th century amid intra-commune strife and troubles with civil authorities. At the time, Oneida was an early-day conglomerate involved in the manufacture of steel animal traps, silk, fruit preserves, carpetbags, straw hats, mop handles and tableware.

Few descendants of the original members remain with the company, but one is Pierrepont (Peter) T. Noyes. Mr. Noyes is the president of Oneida Ltd. and the 58-year-old grandson of the commune's founder, John Humphrey Noyes. John Humphrey Noyes was an ordained minister who in 1848 led a band of 80 people from Vermont in search of a new life.

The elder Mr. Noyes had concluded that the second coming of Christ had already occurred, in 70 A.D., so the millenium had arrived and it was no longer possible to follow the paths of alternate sinning and repentence. His command was: "Sin no more; repent no more; so regulate your lives to eliminate that worst of evils—selfishness."

For his grandson, the worst of evils has been unlimited imports of flatwear, particularly from Japan. In the late 1960s, the U.S. eliminated quotas on stainless-steel flatwear, and imports soon more than quadrupled, directly affecting Oneida's business. In the fiscal year ended Jan. 29, 1972, for instance, Oneida earned $2.2 million, or $1.56 a share, on sales of $72.6 million. This was down from $1.65 a share and $2.04 a share in the two prior years.

But quotas were reinstated in late 1971, and Oneida has since benefited. In the fiscal year ended last Jan. 27, earnings jumped to $2.7 million, or $1.85 a share, on record sales of $80.3 million. Mr. Noyes declines to predict results for this year, but some securities analysts estimate net income should hit at least $2.20 a share. . . .

Oneida Ltd. is the only substantial industry outside of agriculture in this rural area east of Syracuse. And as a residue of its early days, it has maintained some paternalistic practices toward its employes and the towns of Oneida and Sherrill. . . . Gone, however, are the company store and the company dentist, once staples here. Gone, too, is the commune-era practice that men and women rotate jobs from year-to-year in an effort to eliminate feelings of discrimination. Currently, Oneida Ltd.

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doesn't count one female on its executive staff, even though its products largely are purchased by women.

The company has had one unexpected spinoff, the formation of Oneida 2 in Amherst, Mass. Oneida 2 has nothing to do with flatware. Rather, it's an attempt by a group of young people to duplicate the original Oneida commune. As part of a steady stream, they come to the library here to research the commune and its philosophy.

A New Story: Organizing the "Hopeless"

We have received the following communication from Robert Mast of Wayne State University in Detroit, who is hoping to tap the resources of "enlightened affluence" for the purposes of a unique new venture:

> I am working on the theory and practice of organizing white, upper middle class males from business, industry and the professions who are disenchanted with stultifying bureaucracy, competition, classism, racism, sexism and imperialism. The organizing principle under consideration is the work collective, composed of members who have dropped out from their regular jobs, or are in process of dropping out or making mid-career changes. The broad goal of the collective would be to put into motion a left-reform movement coming from white, affluent male elites—a grouping usually considered hopeless by liberal-radical theorists and organizers.
>
> Rules of the collective would include equality of members, democratic decision making and dedication to progressive work. Work of the collective would include research on American society and the movements for social change, development of a methodology to influence brothers to drop out and form counter-institutions, and administration and granting of funds collected from enlightened affluence for use by advanced social groups.
>
> Personal operating principles of members would include consciousness-raising, self-education, reduction of elite privilege, reduction of mindless consumption, humility, proletarianization of self, development of a community service orientation and, in general, a revolutionary perspective. Benefits to members would include personal rebirth, slowing of the aging process, reduction of alienation and improved mental health.
>
> I am searching for insight, experience of others, research findings, creative ideas, criticisms, potential recruits, general inquiries, and small seed funds for expenses.

New Policies at Berkeley

On November 8, 1972, Albert H. Bowker, Chancellor of the University of California at Berkeley, transmitted to his university community "a new policy and procedure statement governing the protection of human subjects under activities for which the Berkeley campus is responsible." This document, designed to implement re-

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quirements established by the U.S. Department of Health, Education, and Welfare, sets forth a series of guidelines for scientific research. The aim of these guidelines is to protect the human subjects of scientific researchers against unwarranted risks, whether these be of a physical, psychological, or sociological kind. The statement defines sociological risks as follows:

> . . . *Social risks* are related in the main to procedures that may place the reputation or status of a social group or an institution in jeopardy. Procedures designed to measure the characteristics of easily defined subgroups of a culture may entail risk if the qualities measured are ones which have positive or negative value in the eyes of the group. Even when research does not impinge directly on it, a group may be derogated or its reputation injured. Likewise, an institution, such as a church, a university, or a prison, must be guarded against derogation, for many people may be affiliated with, or employed by, the institution, and pejorative information about it would injure their reputations and self-esteem. In evaluating social risk, an investigator should ask himself how the findings will appear to persons belonging to any identifiable group—or affiliated with an institution—studied and reported upon. These cautions are as equally warranted in the case of anthropological field research in distant cultures as in studies performed in domestic settings.

What is one to make of so sweeping a set of criteria? One assumes that they originally sprung from a "liberal" impulse to guard the interests and spare the feelings of less favored groups in the population. Yet in their present form they would appear to rule out any sociological research whose conclusions reflect unfavorably on any social or political institution at all. In short, if taken seriously, these criteria make impossible any research that might challenge the status quo. In the 1970's, as in the 1960's, Berkeley continues to remain a very odd place.

Of Goals and Quotas

In almost all of the discussion which has raged about the issue of "affirmative action" to increase the hiring of minority-group members, both sides have generally accepted the premise that quotas are a bad thing. The debate, therefore, has centered around the question of whether the "targets" or "goals" imposed by government affirmative action programs are merely quotas by another name—a suggestion that the supporters of such programs vigorously deny. But now this distinction between goals and quotas has been declared "illusory" by a U.S. District Court—in a decision *favoring* the principle of preferential hiring and imposing a quota system on the Bridgeport, Connecticut, police department. The language of the decision, handed down on January 29, 1973 by Judge Jon O. Newman, is blunt and to the point:

> Much of the controversy in this area has concerned the difference between quota hiring to remedy past discrimination and some arguably

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less rigid approach involving affirmative action toward a goal. Ultimately the distinction becomes illusory. As the time nears to reach the goal, a member of the discriminated group must be hired in preference to a majority group person as often as is required to meet the goal. A quota, for all its unhappy connotations, is simply a recognition of the reality encountered in reaching the desired goal.

Of Hirings and Firings

The legal complications to which race-conscious hiring practices may lead are further demonstrated by a November 9, 1972 ruling by U.S. District Court Judge John Feikens of Detroit. The case was brought against the Ford Motor Company by a black man who charged that his employment had been terminated on racial grounds. The court, upholding the plaintiff, found that "race was a factor (possibly not the only factor) in the termination," a conclusion it reached on the basis of some rather intricate reasoning:

> What must be understood in an analysis of this case is that a black man should not be hired just because he is black. A black person who is hired solely for appearance sake and is inexperienced and not given thorough job training is likely to fail. If that occurs and he is then fired, one may conclude that just as he was hired because he was black, so he was fired because he was black.

A Vote of Confidence for the Media?

"Public Gives News Media in the U.S. Strong Vote of Confidence . . ." So reads the title of a press release from the Television Information Office (TIO) of the National Association of Broadcasters. This conclusion is based on a poll the TIO had taken by R. H. Bruskin Associates. The pollsters asked over 1200 adults this question: "Considering the news you get from all sources combined—from newspapers, radio, television, and magazines—which of these statements best describe how reliable you feel the news is?" The responses were as follows:

	All Media	*Newspapers*	*Television*	*Radio*	*Magazines*
Almost all of it is reliable	22%	22%	28%	21%	16%
A good part of it is reliable	52	47	48	51	43
Only some of it is reliable	20	23	19	21	27
Very little of it is reliable	3	5	3	2	9
Don't know/no response	3	3	2	5	6

For TIO Director Roy Danish, these figures are "heartening": "With 74 per cent of the people saying that almost all or a good part of the news in all media is reliable, I believe we find a strong endorsement by the public of the news it is getting from the large num-

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ber of competing media sources we have in this country." Yet a more impartial observer might be less inclined to view the results of the TIO poll as a pat on the back for the media. After all, they show that 75 per cent of the public believes that at least a significant fraction of the news from all media is *un*reliable. For an institution which is dedicated to presenting the truth, this hardly seems to be something worth boasting about.

Deterrence!

It is increasingly common these days for people to accept the characterization of alcoholism as a disease. But a series of simple yet ingenious experiments performed recently indicates that most victims of this "disease" have a considerable ability to cure themselves—at least if they have the right kind of motivation. The account presented below comes from a report of a speech given at the University of Minnesota by Dr. George Bigelow:

> In a laboratory study, Dr. Bigelow had chronic alcoholics pull on a one-pound lever several thousand times in order to get a drink. He found the same thing—the more times they had to pull on the lever (increased cost), the less the alcoholics drank.
>
> In another study, he varied the amount of time the alcoholics had to wait between drinks in order to get another drink. When they did not have to wait, they drank all the alcohol available. However, when they had to wait longer between drinks they drank less—even though the same amount of alcohol was available. Those who had to wait up to 90 minutes between drinks, drank about half the amount they would have drunk when they did not have to space their drinking.
>
> Loss of privileges in the hospital practically "knocked drinking right out" in a study by another researcher, Dr. Bigelow said. In this study, the alcoholics could have up to 24 drinks per day if they wanted them, but if they took more than five drinks, their privileges were taken away. Privileges included socializing with others, recreation and availability of the usual hospital food.
>
> If a person drank more than five drinks, he was required to stay in his room by himself. Furthermore, his dinner was entirely pureed in a blender.
>
> "I think it is especially significant that they were able to control their drinking—not exceeding five drinks—when it made a difference in how their dinner was fixed," Dr. Bigelow said.
>
> "We saw that moderation was possible with every one of them," he added. "There is something to the 'loss of control' idea, but not as traditionally formulated. Here they demonstrated the ability to stop when they wanted to nearly 80 per cent of the time and only lost control some nine per cent of the time."
>
> Many alcoholics claim that they drink alone. In another experiment, skid row alcoholics tested the validity of this claim. An "isolation booth" about the size of a phone booth was constructed and each person took

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turns sitting in it while drinking. They were given all they wanted to drink.

When people came and talked to the "isolated" alcoholics, they drank all the alcohol availabe. Even when left alone for two minutes, they still drank it all.

When left alone for fifteen minutes, however, an interesting thing happened. All but one of the alcoholics drank less than half as much.

"One guy went and sat in the isolation booth when he came in, 'just for fun,' and told us that was the way he liked to drink—alone," Dr. Bigelow said. "Later, when he was actually left alone for 15 minutes (after requesting a drink), his drinking dropped off the same as the rest of the people."

Stressing that these were all controlled laboratory experiments, and that "we're not that far along" in clinical applications, Dr. Bigelow said that nevertheless, "We've shown that alcohol drinking by chronic alcoholics is controllable, that they can learn to refuse a drink, drink in moderation, or even get drunk and quit again, depending on the drinking environment."

The Discoveries of the Alternative School Movement

The "alternative school" movement in this country, now over five years old, began in opposition to the authoritarianism, rigidity, and dehumanizing tendencies that its founders thought were characteristic of conventional American education. If only students were given the freedom to determine their own learning experience, so the argument ran, if only students and teachers alike were allowed to participate actively and democratically in educational decision-making, if only schools could be permitted to grow "organically" rather than be bound by the tyranny of pre-existing, arbitrary rules, then the passivity and alienation of American teachers and students would dissolve, to be replaced by a new creativity and cohesion. Freedom and community would not only co-exist, they would enhance and enlarge each other.

Recently, members of this movement have been holding meetings to examine their experience with alternative schools in actual operation. One such meeting was the 1972 Conference on Decision-Making in Alternative Secondary Schools—co-sponsored by UNESCO and the Center for New Schools—held in Woodstock, Illinois. In a lengthy and thoughtful report, the conferees outlined their discoveries about the nature of unstructured learning and participatory democracy, which proved far more difficult to achieve than they had originally envisioned. What is fascinating about their conclusions is the extent to which, in seeking to discover the difficulties of alternative schools, they managed to rediscover some time-honored truths of social and political theory.

On the new, independent, creative, self-motivated student they had this to say:

The rapid collapse of naive assumptions about the typical student taking

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control of his or her own learning led alternative school initiators to see the need for strategies that would facilitate the transition of students from the status of dependent to independent learners. In most schools, the result has been a smorgasbord of specific course offerings. . . . This will be followed by a final stage of truly independent learning in which students define their own interests without the course structure. . . . In practice, this theory has encountered a number of difficulties:

1. Many students do not transcend the stage of choosing courses. . . . Further, they continue to deal with the alternative curriculum the same way they dealt with the traditional curriculum: as a game to be beaten, a puzzle to be solved. The students continue to see themselves as consumers of education.
2. Some students do move beyond the course structure. . . . But the students who grow in this way often tend to be the students who benefit most from whatever type of educational program they find themselves in, whether it be traditional or alternative. The students least likely to reach this stage are those who are also served most poorly by the traditional school.
3. The quality of the smorgasbord of course offerings as a curriculum leaves much to be desired. . . .

A . . . perplexing question . . . is the question of specific requirements: *What experiences or competencies should be required of all students?* Most participants agreed that the present learning program of the typical alternative school can often have the effect of limiting later options for students. . . . The problem partly stems from the fact that the open curriculum allows students to avoid certain types of learning experiences. . . . [A]lternative schools have to think much more critically about their responsibility to prepare students for the choices and barriers they will confront after leaving school.

On participatory democracy:

Typically, the initiators of the school began with a commitment to democratizing their governing. . . . The forum for this democratic process was a whole-community or whole-staff meeting. . . . Two major factors limited this approach. The first was the extreme difficulty of making policy in a large meeting. The second was the limited interest many students had in becoming involved in decision-making once the petty rules of the traditional school (e.g. dress code, hall passes, etc.) had been eliminated.

Typically, the all-community meeting was characterized by poor attendance and short tempers. At the same time problems crucial to the school's survival and effectiveness were generally reaching a crisis stage. The need for an alternative approach to decision-making became apparent. . . . Staff meetings and staff committees became the locus of decision-making. . . .

Responsibility had, in fact, been delegated or assumed by a subset of the total school community. . . .

If [certain] conditions are not met . . . the school will enter a third stage. It is characterized by constant complaining by staff and students, low morale, non-compliance with decisions made by the governing group and statements of indifference about the fate of the school. . . .

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On freedom and unstructured spontaneity:

> For both students and staff, 'building a community' and 'doing your own thing' came into constant conflict. In practice, staff and students are often unwilling to change their own personal priorities or habits for the good of the community. . . .
>
> Related to the problems of cooperation in alternative schools is the problem of mutual trust. . . . [P]articipants in alternative schools have guarded carefully against any accumulation of power in the hands of one person or group. This concern has unfortunately led, in many cases, to an extreme lack of trust. Those most concerned about decision-making feel they must directly participate in the formulation of even the tiniest decisions and plans. . . .
>
> But, as indicated earlier, direct democracy has not proved a viable means for operating even a small alternative community. The failure of the town meeting or the all-staff meeting, when they are the only decision-making forum, diminishes trust instead of increasing it. . . . [A]lternative schools must develop mechanisms that will . . . involve the willingness to delegate authority and allow individuals to assume leadership. . . .
>
> [T]hese qualities will not emerge 'naturally.' They must be seen as explicit objectives to work towards and not as the obvious outcome of sincere hopes and dreams. . . .
>
> Participants agreed that one primary characteristic of a successful approach to shared decision-making is *clarity*. This runs counter to the philosophies of many alternative schools who pride themselves on a lack of structure. . . .
>
> Conference participants adopted a different viewpoint. They felt that some clarification and structure empowers rather than limiting them. For example, if meetings are always called spontaneously . . . if meetings are long and rambling, if results aren't publicized, this . . . drastically restricts the types of people who will be involved in decision-making. . . .
>
> There should be a review process built into the governance structure, so that success . . . can be evaluated and in some cases sanctions applied for failure to abide by decisions.
>
> The intent of this discussion is to help overcome some serious contradictions . . . between the growth of a healthy, open community and a style of action that justifies individual selfishness under the banner of freedom. . . . [O]ur continued growth depends on our ability to develop structures that can strengthen alternative schools. To continue the rhetoric of organic growth in the face of recent experience would reflect disastrous inability to profit from past successes and problems.

On education for citizenship:

> Generally, those involved in decision-making . . . are hip white middle class students, whose concerns do not represent the concerns of other student subgroups. . . .
>
> Alternative schools have had a commitment to deal with all types of diversity. . . . With respect to race, social class, and ethnic group . . . alternative schools with diverse student bodies have benefitted white

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middle class students most and low-income students in general and ethnic minorities least. Many popular assumptions of alternative schooling have a middle class white bias. For example . . . allowing a student to do his or her own thing is fine for a student with basic reading, writing, and math skills, but of questionable value to a black or brown student who lacks these skills. . . .

School initiators should carefully examine their reasons for seeking a diverse student body and their capacity to deal with one. Another possible approach is to create a series of alternative schools each with a unique set of purposes, rather than admitting everyone to a single school with vaguely defined purposes.

Each dimension of diversity . . . within an alternative school (e.g., race, career interest) puts an additional strain on our own effort to reach and carry out widely accepted decisions. . . . How much diversity can a school have before legitimate decision-making breaks down?

The following was one summary of what is now required for the alternative schools to gain success:

The alternative school movement needs to develop a 'tradition' [!] that will allow a greater percentage of schools to survive and to reach their ambitious goals. . . .

The conferees are to be applauded for their self-critical honesty. Now if only they had read some of the standard works of political theory *before* they'd launched their projects. . . .

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